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Should Neither Wind nor Rain nor Hurricane Keep Victims from Recovery? Examining the Tort and Insurance Systems' Ability to Compensate Hurricane Victims

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SHOULD NEITHER WIND NOR RAIN NOR HURRICANE KEEP VICTIMS FROM RECOVERY? EXAMINING THE TORT AND INSURANCE SYSTEMS' ABILITY TO COMPENSATE HURRICANE VICTIMS

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Large-scale natural disasters, such as hurricanes, wreak tremendous havoc, causing billions of dollars in damages. Those who suffer serious damage may turn to their insurance providers or the tort system for compensation. But, both the tort and insurance systems present serious limitations to a hurricane victim's recovery. This Note analyzes the goals and criticisms of these two systems to determine which compensates hurricane victims best. In light of its analysis, this Note ultimately concludes that neither system satisfactorily compensates victims. Yet, tort could play some role in hurricane-related damage. Tort law could effectively deter negligent behavior by imposing liability on those who negligently fail to prepare and prevent hurricane-related damage.

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INTRODUCTION

On October 29, 2012, "Superstorm" Sandy made landfall on the coast of New Jersey.[1] Sandy's powerful storm surge topped the sea wall in New York City's financial district, flooding lower Manhattan.[2] Shortly after breaching the sea wall, the record storm surge sent water pouring into the basements and lobbies of downtown buildings, including 2 Gold Street and 201 Pearl Street.[3] The saltwater crystallized in the basement of 2 Gold, causing significant damage to the boiler and electrical switchboards.[4] Further, the water caused the 20,000-gallon oil tank to rupture and release oil into the floodwaters.[5] The contaminated water released diesel fuel fumes throughout the towers.[6] The smell of diesel even reached apartments on the highest floor of 2 Gold.[7] Due to the damages to operational systems, including electric, hot water, water filtration, and sprinkler systems, "all of which were below grade," the building's manager, TF Cornerstone, informed the building's residents that the earliest date for reoccupancy would be March 1, 2013.[8]

On November 19, 2012, residents filed a putative class action in New York State court alleging that TF Cornerstone negligently failed to secure the premises, despite warnings issued by the National Hurricane Center and the New York City government.[9] The suit alleged gross negligence, negligence, and breach of the warranty of habitability.[10] The plaintiffs claimed that TF Cornerstone failed to protect the property, particularly the entrance to its parking garage with sandbags, or to take other effective precautions.[11] The complaint also alleged that many apartments in the building were burglarized by nonresidents because of the managing agent's negligence.[12] The plaintiffs seek, among other things, an award of damages.[13]

When the residents of 2 Gold and 201 Pearl suffered personal and financial losses due to Hurricane Sandy, they turned to tort law for compensation. Their other alternative, if insured, would have been to file a claim with their insurance providers.

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1. *See Hurricane Sandy: Timeline*, FED. EMERGENCY MGMT. AGENCY, http://www.fema.gov/hurricane-sandy-timeline (last visited Nov. 26, 2014).
2. *See Assessing the Damage from Hurricane Sandy*, N.Y. TIMES (Oct. 29, 2012), http://www.nytimes.com/interactive/2012/10/30/nyregion/hurricane-sandys-aftermath.html?_r=0.
3. *See* Summons & Class Action Complaint, ¶ 36, at 8, Cashwell v. 2 Gold, LLC (N.Y. Sup. Ct. Nov. 19, 2012) (No. 158155/2012), 2014 WL 3543541.
4. *See id.* ¶ 38, at 9.
5. *Id.* ¶ 39, at 9.
6. *Id.* ¶ 40, at 9.
7. *See id.*
8. *See id.* ¶ 53, at 11.
9. *See id.* ¶ 1, at 1–2.
10. *See id.* ¶ 54–74, at 11–14.
11. *See id.* ¶ 37, at 8.
12. *See id.* ¶ 43, at 9.
13. *Id.* at 15.

In tort, a person who is harmed may file a civil lawsuit to recover damages from the person who caused the harm.[14] The law, however, will only impose civil liability if the law recognizes a legal obligation, known as a duty, owed to the injured person by the injurer.[15] Tort law recognizes that the person who should have prevented the injury should be held responsible for the resulting injury and losses.[16] Thus, when an injured person is best able to avoid his injuries, "[n]o one else [is] responsibl[e] for the harm that has befallen him."[17] When the tort system imposes civil liability on a defendant and provides a victim damages, it acts similarly to the insurance system by shifting "the cost of providing financial resources for accident victims" from the victim to another party.[18]

After a natural disaster like Hurricane Sandy, the insurance industry is rarely left unaffected by the losses incurred by policyholders during the storm. "[I]nsurance companies will pay an estimated 18.8 billion dollars in claims to their policyholders" for property damage caused by Hurricane Sandy, "making Sandy the third costliest storm in U.S. history, as defined by insurance claims payouts."[19] Hurricane Katrina in 2005 cost insurance companies $48.7 billion and Hurricane Andrew in 1992 cost $25.6 billion.[20]

The storm-related personal and financial losses like those suffered by the residents of 2 Gold and 201 Pearl Street are not unusual and are expected to increase in the United States.[21] While there is no definitive scientific evidence showing "whether storms like Sandy are growing more common, evidence indicates climate change is already altering environmental conditions in a way that suggests there may be changes in the frequency, intensity, duration, and timing of future" storms.[22] The federal and state

14. *See infra* Part I.A.

15. *See infra* Part I.A.1.

16. *See* MARSHA L. BAUM, WHEN NATURE STRIKES: WEATHER DISASTERS AND THE LAW 63 (2007).

17. *See id.* at 63–64.

18. *See* Beatrice A. Beltran, *Posner and Tort Law As Insurance*, 7 CONN. INS. L.J. 153, 154 (2001) (internal quotation marks omitted).

19. *See Over 90 Percent of the New Jersey and New York Sandy Insurance Claims Have Been Settled; Likely to Be Third Largest Storm Ever for U.S. Insurers*, U.S. INS. INFO. INST., http://www.iii.org/press_releases/over-90-percent-of-the-new-jersey-and-new-york-sandy-insurance-claims-have-been-settled-likely-to-be-third-largest-hurricane-ever-for-us-insurers.html (last visited Nov. 26, 2014). These insurance payouts are for property coverage only. Any flood damage covered by the National Flood Insurance Program is not included. *Id.*

20. *See id.* The insured damage amounts for Hurricanes Katrina and Andrew have been adjusted for inflation through 2012 by the Insurance Information Institute using the Consumer Price Index. *Id.*

21. *See* HURRICANE SANDY REBUILDING TASK FORCE, HURRICANE SANDY REBUILDING STRATEGY: STRONGER COMMUNITIES, A RESILIENT REGION 33 (2013) [hereinafter SANDY REBUILDING STRATEGY].

22. *See id.*; *see also* Kerry A. Emanuel, *Downscaling CMIP5 Climate Models Shows Increased Tropical Cyclone Activity over the 21st Century*, 110 PROC. NAT'L ACAD. SCI. U.S. AM. 12219 (2013). This study predicts a 40 percent global increase in hurricanes of Category 3 and higher over the twenty-first century. *Id.* at 12221.

governments have recognized these future risks and have responded accordingly.[23]

This Note considers whether courts should also play a role in hurricane-related events by offering compensation through the tort system or rather should leave compensation to insurers. Part I provides an overview of the development of tort and the negligence doctrine, and outlines the problems faced by hurricane victims when they turn to the tort system for compensation. Part II examines the basics of insurance law, the insurance issues raised by Hurricane Katrina, and both the state and federal responses to hurricane-related insurance gaps. Part III details the justifications advanced in favor of the tort and insurance systems, while also examining these systems' major criticisms. Finally, Part IV applies these goals and criticisms to the circumstances of hurricane victims and suggests that neither mechanism adequately compensates hurricane victims, although tort may play a deterrence role in the hurricane-related context.

I. DEVELOPMENT OF TORT LAW

This part examines the development of tort law and the negligence doctrine, and the role the doctrine plays within the law more broadly. It next describes the elements of a traditional tort claim. It then explains the role foreseeability plays in a court's negligence analysis and how courts sometimes use a balancing approach to determining liability. Finally, it discusses hurricane-related tort issues.

Torts are broadly defined[24] to encompass any "civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages."[25] Tort law involves "many cases of first impression" in which "new . . . torts are being recognized constantly."[26]

The origins of tort law are found in early English common law.[27] In English law, "remedies for wrongs depended upon the issuance of writs to bring the defendant into court."[28] The number and forms of writs were

23. *See* SANDY REBUILDING STRATEGY, *supra* note 21; *see also* S. 3761, 2013 Gen. Assemb., Reg. Sess. (N.Y. 2013). The New York Senate passed a bill called the Natural Disaster Preparedness and Mitigation Act, recognizing that New York's climate and weather patterns are changing, "due, in part, to global warming [and] that large areas of the state have been severely impacted by repeated hurricanes, tropical storms and other weather related natural disasters during the past few years." *Id.*

24. *See* 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 2:1 (J.D. Lee & Barry A. Lindahl eds., 2d rev. ed. 2002) [hereinafter 1 MODERN TORT LAW].

25. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 2 (5th ed. 1984). Although damages are the usual remedy in tort law, other remedies may also be available, such as an injunction or specific restitution. *Id.* § 1, at 2 n.6.

26. *Id.* § 1, at 3; *see, e.g.*, Daily v. Parker, 152 F.2d 174, 177 (7th Cir. 1945) (holding that a child has a cause of action against one for interfering with the support and maintenance of its father); Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946) (holding that an unborn child, viable and capable of existing independently of the mother at the time injuries are wrongfully inflicted, may, after birth, maintain an action for such injuries); Cole v. Atlanta & W.P.R. Co., 31 S.E. 107, 107 (Ga. 1897) (holding a common carrier liable for insulting a passenger).

27. *See* KEETON ET AL., *supra* note 25, § 6, at 29.

28. *See id.*

limited, resulting in "a highly formal and artificial system of procedure, which governed and controlled the law as to the substance of wrongs which might be remedied."[29] Only two writs existed for tortious conduct: (1) the action of trespass and (2) the action of trespass on the case.[30] An action of trespass was an action "for all forcible, direct and immediate injuries, whether to person or to property."[31] Trespass on the case,[32] on the other hand, was developed as a complement to the action of trespass "to afford a remedy for obviously wrongful conduct resulting in injuries which were not forcible or not direct."[33] Today, tort law does not classify injuries as direct or indirect, instead the law looks to remedy the intentional harms of the tortfeasor or injuries resulting from his negligence.[34]

A. Negligence Generally

Negligence[35] is the primary standard for liability in the modern tort law system.[36] The transition from the antiquated writs of trespass and action on the case was accompanied by a growing recognition that, regardless of the form of the action, there should be no liability for pure accident, and that the defendant must be found to be at fault—possessing either a wrongful intent or negligence.[37] Negligence diverged from intentional injuries

29. *See id.*
30. *See id.*
31. *See id.*
32. Trespass on the case is also known as action on the case. *See id.*
33. *See id.*

> The classic illustration of the difference between trespass and case is that of a log thrown into the highway. A person struck by the log as it fell could maintain trespass against the thrower, since the injury was direct; but one who was hurt by stumbling over it as it lay in the road could maintain, not trespass, but an action on the case.

Id. The emphasis is on whether the injury was direct (trespass) or indirect (trespass on the case). *Id.* § 6, at 29.

34. *See id.* § 8, at 34.

35. This Note explores the doctrine of negligence and does not explore intentional torts. Intentional torts are separate from torts derived from negligence. An intentional tort "is one in which the actor has the specific intent to inflict injury or engages in conduct that is substantially certain to result in injury." 74 AM. JUR. 2D *Torts* § 17 (2013). Hurricane-related torts are generally not intentional, and therefore this Note does not explore intentional torts.

36. *See* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 607 (1992). Negligence, however, is a relatively new concept in tort law. *See* JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 149 (7th ed. 2007). It was not until the nineteenth century, in response to a changing social and political environment caused by the Industrial Revolution, that the negligence cause of action was first recognized. *Id.* at 149, 153 (citing Cornelius J. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 229–30 (1971)). In contrast, under early Anglo-Saxon and medieval common law, individuals were strictly liable for causing injury to another individual. *Id.* at 149–50 (citing Peck, *supra*, at 225–26). For example, "[t]he doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer." John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 317 (1894).

37. *See* KEETON ET AL., *supra* note 25, § 28, at 160–61.

(which became a distinct field of liability) and became the "dominant cause of action for accidental injury."[38]

Legal historians generally cite *Brown v. Kendall*[39] as the case which introduced a fault-based, negligence paradigm to American tort law.[40] In *Brown*, two dogs "were fighting in the presence of their masters."[41] In an effort to separate the two dogs, the defendant began beating the dogs with a stick.[42] At one point, the defendant raised his stick, hitting the plaintiff in the eye and causing serious injury.[43] The plaintiff sought to recover on the writ of trespass,[44] whereby a plaintiff traditionally could establish a prima facie case simply by proving that his injuries were the direct result of the defendant's act—a relationship[45] that clearly existed in this case. The court, however, abolished the rule that a direct physical injury entailed strict liability.[46] The court held that the defendant should only be liable if he was at fault.[47] A defendant who attempted to beat a dog, but unintentionally struck the plaintiff instead, would not be liable for battery despite applying direct force.[48] Instead, the defendant would be liable for battery only if he intended to strike the plaintiff or if he was at fault in striking him.[49] According to the court, fault should be determined by whether or not the defendant was acting with "ordinary care and prudence."[50]

Negligence, therefore, is the failure to exercise reasonable care under all the circumstances.[51] In determining whether a person's conduct falls below the standard of reasonable care, courts consider the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.[52] Negligence may consist of an act or omission or failure to act.[53] Frequently, negligence involves the failure to take reasonable precaution.[54]

In the United States, each state develops its own tort law, "which includes common law, settled disputes that have written judgments, and

38. *See id.* § 28, at 161.
39. 60 Mass. (6 Cush.) 292 (1850).
40. *See* KEETON ET AL., *supra* note 25, § 28, at 163.
41. *Brown*, 60 Mass. (6 Cush.) at 292.
42. *Id.*
43. *Id.* at 292–93.
44. *Id.* at 292.
45. *See* KEETON ET AL., *supra* note 25, § 6, at 29.
46. *Brown*, 60 Mass. (6 Cush.) at 296.
47. *Id.* at 295.
48. *Id.* at 297.
49. *Id.*
50. *Id.* at 298.
51. *See* ELLEN M. BUBLICK, A CONCISE RESTATEMENT OF TORTS 59 (3d ed. 2013).
52. *See id.* at 62.
53. *See* 1 MODERN TORT LAW, *supra* note 24, § 3:1.
54. *See* BUBLICK, *supra* note 51, at 63.

legislation."[55] All state negligence law requires four elements to establish liability: (1) duty, (2) breach, (3) causation, and (4) damages.[56]

1. Duty and Breach

There must be a legal duty "requiring a person to conform to a certain standard of conduct, for the protection of others against unreasonable risks."[57] If there is no legal duty, the defendant cannot be held liable for the injuries he causes.[58] Generally, every person "must conform to the legal standard of reasonable conduct in the light of the apparent risk."[59] A risk is unreasonable if a reasonable person would have foreseen it.[60]

Duty is concerned with the relationship between individuals—"it imposes a legal obligation on one party for the benefit of the other party."[61] Thus, courts look to whether a relationship exists between the parties to determine whether a legal duty exists.[62] Furthermore, the existence of a duty is decided based on public policy considerations.[63] Whether public policy precludes liability is a matter of law decided by the court.[64]

Breach is the failure to conform to the required standard of conduct or legal duty.[65] Although the term negligence is frequently used to mean a breach of duty alone, courts use the term to mean the elements of duty and breach together.[66]

2. Damage and Causation

The cause of action also requires loss or damage suffered by the plaintiff.[67] Thus, doing something that causes no harm does not constitute an actionable tort.[68] In the past, the types of harm for which compensation were allowed were rather restricted.[69] However, courts have steadily expanded the categories of compensable harm.[70] For example, some modern courts compensate for intangible injuries, such as emotional harm and loss of companionship.[71]

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55. TERENCE J. CENTNER, AMERICA'S BLAME CULTURE: POINTING FINGERS AND SHUNNING RESTITUTION 23 (2008).
56. *See id.*
57. *See* KEETON ET AL., *supra* note 25, § 30, at 164.
58. *See* 1 MODERN TORT LAW, *supra* note 24, § 3:3.
59. *Id.*
60. *See id.* § 3:4.
61. *Id.* § 3:3.
62. *Id.*
63. *Id.*
64. *Id.*
65. *See* KEETON ET AL., *supra* note 25, § 30, at 164.
66. *See id.*
67. *See id.* § 30, at 165.
68. *See* 74 AM. JUR 2D, *supra* note 35, § 9.
69. *See* KEETON ET AL., *supra* note 25, § 6, at 29.
70. *See id.* § 127, at 951–52.
71. *See id.*; *see also* Bradley v. Sebelius, 621 F.3d 1330, 1335 (11th Cir. 2010) (stating that "under Florida law, in a recovery for wrongful death action, children of the decedent may recover for lost parental companionship"); Christensen v. County of Boone, 483 F.3d

Finally, the breach of duty must be the cause of the resulting injury.[72] The plaintiff must show that the defendant's tortious action is both the actual cause, or "cause-in-fact," and the proximate cause of his injuries.[73] The defendant's action is established as an actual cause by showing that the harm would not have occurred but for the defendant's conduct.[74]

The second causal requirement for recovering damages is the requirement that the defendant's conduct be the proximate cause of the plaintiff's injuries.[75] Proximate cause is a legal construct that serves to establish to what extent a tortfeasor will be held liable for his conduct.[76] A plaintiff must fulfill three basic requirements in establishing proximate cause: "(1) that without the misconduct, the injury would not have occurred, commonly known as the 'but for' rule; (2) that the injury was a natural and probable result of the misconduct; and (3) that there was no efficient intervening cause."[77] Even if a defendant is the "but for" cause of a plaintiff's injuries, a court, through the proximate cause analysis, may determine that other considerations outweigh holding a defendant liable, such as policy reasons.[78]

3. Foreseeability

Foreseeability of injury is generally recognized as an element of the duty analysis.[79] To establish an actor's negligence, the risk of harm to others "must be foreseeable to the actor at the time of his conduct."[80] A plaintiff can show negligence by proving that the defendant failed to take a precaution that would have reduced the likelihood of harm.[81] Usually, this precaution "will consist of some way in which the actor could have modified the activity engaged in."[82]

B. The Balancing Approach to Negligence

A finding of negligence may depend on a court's cost-benefit analysis.[83] Following *Brown*, courts became more willing to balance the social benefit of an activity with the risk of harm to the public in determining whether the defendant presented an unreasonable risk of harm to another.[84]

454, 465 (7th Cir. 2007) (stating that Illinois law "recognizes the tort of intentional infliction of emotional distress").

72. *See* KEETON ET AL., *supra* note 25, § 30, at 165.
73. *See* 74 AM. JUR 2D, *supra* note 35, § 27.
74. *Id.* § 26.
75. *Id.* § 27.
76. *Id.*
77. *Id.*
78. *Id.*
79. *See* 1 MODERN TORT LAW, *supra* note 24, § 3:4.
80. *See* BUBLICK, *supra* note 51, at 62.
81. *See id.* at 63.
82. *Id.* at 64.
83. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 34 (1972).
84. *See* Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System As a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 26 (2002).

In *United States v. Carroll Towing Co.*,[85] Judge Learned Hand articulated a balancing test as the standard for determining questions of liability.[86] *Carroll Towing* was an admiralty case in which a barge in a busy harbor broke loose of its moorings, collided with a tanker, and sank.[87] The harm could have been avoided if a caretaker or bargee had been on board at all times, but the bargee had left the barge the night before.[88] The question was whether the absence of a bargee makes the owner of a barge liable for damages to other vessels when the barge breaks from its moorings.[89]

While discussing the barge owner's negligence, Judge Hand held that "the owner's duty . . . is a function of three variables: (1) The probability that [the barge] will break away; (2) the gravity of the resulting injury, if she does; [and] (3) the burden of adequate precautions."[90] Specifically, the probability is the "overall level of the foreseeable risk created by the actor's conduct and the 'benefit' is the advantages that the actor or others gain if the actor refrains from taking precautions."[91]

Judge Hand further held that the variables could be stated in algebraic terms: "if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$."[92] The burden can take many forms, but is usually a financial burden borne by the actor.[93] Thus, the Hand formula is susceptible to economic reasoning.[94] Under the Hand balancing test, a court should hold a defendant liable when he failed to exercise care in a setting in which the cost of additional care "is less than the expected injury costs that be avoided" ($B < PL$).[95]

C. Tort Law in the Natural Disaster Context: Hurricanes, Negligence, and Acts of God

Historically, mankind attributed changes in the weather to divine forces.[96] The concept that weather and its consequences are caused by divine forces has slowly penetrated the law.[97] Large-scale natural disasters have become "viewed as and often called 'Acts of God' . . . 'vis major', or 'force of nature.'"[98] In tort law, defendants have often asserted an act of

85. 159 F.2d 169 (2d Cir. 1947).

86. *Id.* at 173; *see also* Keith N. Hylton, *Duty in Tort Law: An Economic Approach*, 75 FORDHAM L. REV. 1501, 1502 n.7 (2006).

87. *See Carroll Towing*, 159 F.2d at 171.

88. *Id.*

89. *Id.* at 172.

90. *Id.* at 173.

91. *See* BUBLICK, *supra* note 51, at 60.

92. *Carroll Towing*, 159 F.2d at 173.

93. *See id.*

94. *See* Hylton, *supra* note 86, at 1503.

95. *See id.*

96. *See* Kenneth T. Kristl, *Diminishing the Divine: Climate Change and the Act of God Defense*, 15 WIDENER L. REV. 325, 325 (2010).

97. *See id.*

98. *Id.*; *see, e.g.*, Woodbine Auto, Inc. v. Se. Pa. Transp. Auth., 8 F. Supp. 2d 475, 481 (E.D. Pa. 1998) (citations omitted) ("It is well-established that the affirmative defense of *vis*

God defense to avoid liability.[99] What constitutes an act of God varies in different jurisdictions.[100] But many courts define acts of God as natural forces, which "must be something more" than ordinary natural events.[101] Courts describe acts of God as natural forces that are "extraordinary," "unexpected," "sudden," "unusual," and "unprecedented."[102] Furthermore, courts consider the intensity of the event, characteristics of the area, and climatic history in order to determine whether a particular event should be classified as an act of God.[103]

1. Foreseeability of Acts of God

Foreseeability plays a role in courts' determination of whether a natural event should be defined as an act of God.[104] Courts require that the event "be one that no amount of reasonable foresight . . . or care could have prevented."[105] In a negligence action, acts of God relate to the issue of

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major or force of nature (formerly 'Act of God') is the concept of a natural force of such inevitability and irresistibleness that man cannot cope with it, either to predict, forestall it or control it when it arrives.").

99. *See* Kristl, *supra* note 96, at 328.

100. *See id.* at 329.

101. *Id.* at 329–30.

102. *See, e.g.*, Barnard-Curtiss Co. v. United States, 257 F.2d 565, 568 (10th Cir. 1958) (holding that a flood could only be an act of God if the rains were "an unprecedented and extraordinary occurrence of unusual proportions"); Dollar Thrifty Auto Grp., Inc. v. Bohn-DC, LLC, 23 So. 3d 301, 304 (La. Ct. App. 2008) (holding that "[a] hurricane that causes unexpected and unforeseeable devastation with unprecedented wind velocity, tidal rise, and upriver tidal surge is a classic case of an 'Act of God' or force majeure"); Brown v. Williams, 850 So. 2d 1116, 1123 (La. Ct. App. 2003) (defining act of God as "an unusual, sudden and unexpected manifestation of the forces of nature which man cannot resist").

103. *See, e.g.*, Keystone Electric Mfg., Co. v. City of Des Moines, 586 N.W.2d 340, 351 (Iowa 1998) (holding that to determine whether a flood should be characterized as an act of God, "courts consider whether the flood's 'occurrence and magnitude should or might have been anticipated, in view of the flood history of the locality and the existing conditions affecting the likelihood of floods, by a person of reasonable prudence'" (quoting 72 AM. JUR. 2D *Waters* § 224, at 669 (1975))); McCutcheon v. Tri-County Grp. XV, Inc., 920 S.W.2d 627, 632 n.2 (Mo. Ct. App. 1996) (stating that the act of God defense is only available "where it is 'an event in nature so extraordinary that the history of climatic variations in the locality affords no reasonable warning of their coming' and is not humanized through the participation of man" (quoting Corrington v. Kalicak, 319 S.W.2d 888, 892 (Mo. Ct. App. 1959)); Sky Aviation Corp. v. Colt, 475 P.2d 301, 304 (Wyo. 1970) (holding that ordinary acts of nature "which are usual at the time and place" which reasonably could not have been anticipated will not relieve a negligent person of liability).

104. *See* Kristl, *supra* note 96, at 331.

105. *See id.*; *see also* Brown v. Sandals Resorts Int'l, 284 F.3d 949, 954 (8th Cir. 2002) (holding that under South Dakota law, "an act of God is defined as 'any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected, could have been prevented'" (quoting Nw. Bell Tel. Co. v. Henry Carlson Co., 165 N.W.2d 346, 349 (S.D. 1969))); Rector v. Hartford Accident & Indem. Co., 120 So. 2d 511, 514–15 (La. Ct. App. 1960) (stating that an act of God is an "extraordinary manifestation of the forces of nature which could not have been foreseen and the effect thereof avoided by the exercise of reasonable prudence, diligence and care" (quoting S. Air Transp. v. Gulf Airways, 40 So. 2d 786, 791 (La. 1949)); L.G. Balfour Co. v. Ablondi & Boynton Corp., 338 N.E.2d 841, 844 (Mass. App. Ct. 1975) (defining act of God as a force not attributable to the conduct of man and not

negligence in terms of the foreseeability of the natural event and the foreseeability of harm occasioned by the actor's conduct.[106] Relevant to foreseeability is preventative or precautionary measures available to an actor.[107]

Several forms of precautions can be relevant in protecting against extraordinary natural events or acts of God.[108] For example, an "actor can be negligent in building facilities that are unreasonably inadequate in protecting against foreseeable natural events."[109] Thus, an actor may be negligent in designing or constructing a building that collapses during a hurricane.[110] In such a case, the foreseeable likelihood of harm relates to which serious natural events can be contemplated during the expected life of the building.[111] An actor can also be negligent for failing to adopt appropriate precautions when a serious adverse natural event is imminent.[112] In conducting a negligence analysis in such a case, however, the immediacy of the natural event reduces the significance of foreseeability as a negligence factor, although foreseeability is still a concern in terms of the severity of the storm.[113]

2. Sole Proximate Cause

An act of God defense may or may not relieve an actor of liability. A determination of liability usually depends on whether or not the act of God is the proximate cause of the plaintiff's damage.[114] If the act of God is the sole or exclusive cause, then an actor will avoid liability.[115] However, "in cases of joint causation, when two causes, one of human origin and the other of natural origin, combine to cause [an] injury," it is difficult to allocate liability between the negligent act of the defendant and the natural cause.[116] Some courts will not allow the defendant to escape liability if there is some element of human activity or intervention that contributes in some way to the injury.[117] However, other courts may allow a defendant to limit his liability to that portion of the injury his own conduct caused.[118]

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reasonably "preventable by human foresight, strength or care" (quoting Hecht v. Bos. Wharf Co., 107 N.E. 990, 991 (Mass. 1915)).

106. *See* BUBLICK, *supra* note 51, at 65–66.

107. *See id.*

108. *See id.*

109. *Id.* at 65.

110. *Id.*

111. *See id.*

112. *See id.*

113. *Id.* at 65–66.

114. *See* Denis Binder, *Act of God? Or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law*, 15 REV. LITIG. 1, 24–28 (1996); Kristl, *supra* note 96, at 332–33.

115. Kristl, *supra* note 96, at 333.

116. *See* Binder, *supra* note 114, at 24.

117. *See, e.g.*, Inland Power & Light Co. v. Grieger, 91 F.2d 811, 816–17 (9th Cir. 1937) (stating that when an act of God is concurrent with defendant's negligence, defendant is liable as if he had caused the harm); Fairbrother v. Wiley's Inc., 331 P.2d 330, 336–37 (Kan. 1958) (declaring that defendant is not excused from liability when the "'act of God' would not have wrought the injury but for the human negligence which contributed thereto"); Supervisor & Comm'rs v. Jennings, 107 S.E. 312, 315 (N.C. 1921) (describing the well-

The causation analysis primarily focuses on the reasonableness of the defendant's conduct in light of the foreseeable risks.[119] If the defendant could have reasonably expected that the resulting injuries might have been avoided or prevented by reasonable care or foresight, liability may ensue.[120] Thus, an act of God defense will fail if "one builds in geologically fragile areas, or with improper building methods, or follows up with inadequate inspection and maintenance."[121]

3. Negligence and Invoking the Act of God Defense

To successfully invoke the act of God defense, the party asserting the defense must prove not only the occurrence of the act of God but must also establish lack of fault in order to avoid liability.[122] For example, in *Skandia Insurance Co. v. Star Shipping*,[123] plaintiffs sought recovery for damage to their cargo sustained due to flooding associated with Hurricane Georges while sitting in a container yard in Alabama.[124] The parties did not dispute that the hurricane was an act of God.[125] The plaintiffs, however, argued that, even though the hurricane was an act of God, the defendants were liable because they failed to take reasonable precautions in securing the containers or moving them out of harm's way.[126] In response, the defendants invoked the act of God defense, arguing that the damage "could not have been prevented by reasonable care and foresight."[127] Specifically, they argued it was impossible to move the containers in time to avoid the damage.[128]

First, the court accepted that an act of God defense was applicable to the case, noting that the law considers hurricanes to be acts of God.[129] Next, the court also accepted that the defense could be asserted in the present circumstances because statutes traditionally exempt the responsibilities of

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settled rule that the defendant is responsible even though his negligence is concurrent with an act of God).

118. *See, e.g.*, McAdams v. Chi., R.I. & P. Ry. Co., 205 N.W. 310, 311 (Iowa 1925) (holding that a negligent defendant should not be liable for damages that would have resulted from a flood regardless of the defendant's actions); Rix v. Town of Alamogordo, 77 P.2d 765, 770 (N.M. 1938) (supporting the trial court's attempt to apportion damages between those injuries resulting from unusual rainfall and those resulting from a combination of extraordinary rainfall and defendant's negligent acts); Radburn v. Fir Tree Lumber Co., 145 P. 632, 633 (Wash. 1915) (holding that the defendant should be liable only for damages to crops resulting from the defendant's negligent act but should not be liable for damages resulting from rainfall).

119. *See* Binder, *supra* note 114, at 29.

120. *Id.* at 25.

121. *Id.* at 25–26.

122. *See* Skandia Ins. Co. v. Star Shipping AS, 173 F. Supp. 2d 1228, 1241–42 (S.D. Ala. 2001).

123. 173 F. Supp. 2d 1228 (S.D. Ala. 2001).

124. *Id.* at 1233.

125. *Id.* at 1233 n.2.

126. *See id.* at 1233.

127. *Id.* at 1238.

128. *Id.*

129. *Id.* at 1239–40.

shippers and carriers, like the defendants, from liability for losses caused by an act of God.[130] Yet, the court concluded that the defense would apply only in the absence of contributing human negligence.[131] Thus, the defendant not only had to prove that the natural event constituted an act of God but also had to show that "damage from the natural event could not have been prevented by the exercise of reasonable care."[132]

If a defendant had adequate warning and the means to take proper precautions but failed to do so, then the defendant cannot invoke the act of God defense and thus is responsible for any loss.[133] However, if there were insufficient warnings or insufficient means to prevent the damage, then the defendant is not liable for the loss.[134] In other words, the accident or damage must be unforeseeable and unavoidable to support the defense.[135]

The *Skandia Insurance* court found that Hurricane Georges, although an act of God, was not of such catastrophic proportions as to totally absolve the defendants of the responsibility to take reasonable precautions and to preclude any negligence assessment.[136] Thus, the court looked to whether the defendant had established its lack of fault.[137] Given that weather reports leading up to the storm were inconsistent and constantly changing, the court held that the defendants lacked adequate notice of the approaching storm and therefore could not have prevented the loss caused by the hurricane.[138] The court also determined that none of the defendants were aware that the container yards where the containers were stored had been flooded in previous storms.[139] The defendants successfully established that reasonable care would not have prevented the water damage to the cargo.[140] Therefore, the plaintiffs were not entitled to recovery because the cargo damage was caused by an act of God and not due to any negligence on the part of the defendants.[141]

D. What Remains for Tort? Further Limitations to Tort Recovery in a Natural Disaster Context

All levels of government play a role in providing assistance during and after natural disasters.[142] The federal government exercises its role through

130. *Id.* at 1240.
131. *Id.*
132. *Id.* at 1241 (quoting Mamiye Bros. v. Barber S.S. Lines, Inc., 241 F. Supp. 99, 107 (S.D.N.Y. 1965)).
133. *Id.*
134. *Id.*
135. *Id.* at 1243.
136. *Id.*
137. *Id.*
138. *Id.* at 1243–53.
139. *Id.*
140. *Id.* at 1253.
141. *Id.* at 1252.
142. David G. Tucker & Alfred O. Bragg III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 838 (2001).

the Federal Emergency Management Agency (FEMA).[143] At the state and local levels, governments mobilize resources and coordinate response efforts.[144]

Tort law, however, is private law.[145] Typically, "[t]he parties are not the public, nor strangers to the controversy, but rather are the actors and victims themselves."[146] Thus, natural disasters and large-scale emergencies limit the role of tort law because the primary actors are usually public entities or government employees who enjoy some degree of immunity.[147]

1. Sovereign Immunity Generally

The concept of sovereign immunity is rooted in the medieval English idea that kings could not be sued because they were governed by divine right and could do no wrong.[148] As the state replaced the monarch, it also took on the sovereign's immunity.[149] The doctrine of sovereign immunity was also adopted in the United States and, for a significant period of time, courts held that governmental entities were immune from tort liability.[150] However, as recently as the middle of the twentieth century, the federal and state governments surrendered their absolute immunity from suit.[151] Nevertheless, some kind of immunity for government entities still remains.[152]

2. Federal and State Immunity

In 1946, the federal government waived its immunity to tort actions under certain circumstances by enacting the Federal Tort Claims Act[153] (FTCA). Under the FTCA, the government is liable for torts in much the same way a private actor would be liable.[154] The FTCA, however, carves out an exception for claims based upon the performance or failure to perform a "discretionary function or duty."[155]

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143. *Id.*
144. *See id.*
145. *See* George W. Conk, *Will the Post 9/11 World Be a Post-Tort World?*, 112 PENN ST. L. REV. 175, 177 (2007).
146. *See id.*
147. *See id.*
148. *See* 2 DAN B. DOBBS ET AL., THE LAW OF TORTS § 334 (2d ed. 2011).
149. *Id.*
150. *See, e.g.*, Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850) (stating that the doctrine is "universally assented to" and "no maxim is thought to be better established"); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Briggs v. Light-Boat Upper Cedar Point, 93 Mass. (11 Allen) 157, 162 (1865) (recognizing that "[i]t is an elementary and familiar principle of English and American constitutional law, that no direct suit can be brought against the sovereign in his own courts without his consent").
151. *See* 2 DOBBS ET AL., *supra* note 148, § 334.
152. *Id.*
153. 28 U.S.C. § 1346 (2012); *see also* 2 DOBBS ET AL., *supra* note 148, § 335.
154. *See* 28 U.S.C. § 2674 (stating that "[t]he United States shall be liable . . . [in] tort claims, in the same manner and to the same extent as a private individual under like circumstances").
155. 28 U.S.C. § 2680(a).

To determine whether this exception applies, the U.S. Supreme Court articulated a two-prong test in *Berkovitz v. United States*[156] and affirmed the test in *United States v. Gaubert*.[157] First, a court must consider if the governmental action in question involved an element of judgment or choice on the part of a government actor.[158] The exception cannot apply if a federal statute, regulation, or policy specifically mandates a course of action for the actor to follow.[159] Thus, if the government fails to act in accordance with a specific, mandatory directive, the government is vulnerable to suit.[160] Second, if the challenged conduct does involve an element of judgment, that judgment must be based on policy considerations—the types of judgments the discretionary function exception was designed to shield.[161] This second prong is met if the actions were susceptible to policy analysis, whether or not the government employee actually made a policy determination.[162] Furthermore, there is a strong presumption that if the regulation affords the employee discretion, the employee's discretionary actions necessarily involve policy considerations.[163] In sum, for a tort claim against the federal government to be successful a plaintiff must first show that the conduct in question does not fall within the discretionary function exception.[164]

Other statutes, especially where the federal government chooses to involve itself in the natural disaster or emergency context, specifically recognize an exception to tort liability or retain governmental immunity altogether.[165] For example, the Robert T. Stafford Disaster Relief and Emergency Act,[166] which constitutes the statutory authority for most federal disaster responses (especially as they pertain to the Federal Emergency Management Agency), includes a discretionary function or duty exemption from liability.[167] The Flood Control Act of 1928 (FCA) also contains an immunity provision, which states: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."[168] Enacted in 1928 in response to the devastating flood of the Mississippi River Valley in 1927, the Flood Control Act was

156. 486 U.S. 531 (1988).
157. 499 U.S. 315 (1991).
158. *See Berkovitz*, 486 U.S. at 536.
159. *Id.*
160. *Id.* at 544.
161. *Id.* at 536. The Court noted that the discretionary function exception was designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 536–37 (citations omitted).
162. *See Gaubert*, 499 U.S. at 325.
163. *See id.* at 324.
164. *See Berkovitz*, 486 U.S. at 544.
165. *See* 42 U.S.C. § 5148 (2012); 33 U.S.C. § 702c (2012).
166. *See* 42 U.S.C. §§ 5121–5207. The Stafford Act guarantees that disaster victims will receive help through FEMA, which may include financial assistance. *See id.* § 5174.
167. *See id.* § 5148. This section provides that "[t]he Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty." *See id.*
168. *See* 33 U.S.C. § 702c.

the federal government's first major foray into natural disaster management.[169] Although enacted before the FTCA, courts interpreted the FCA to immunize the federal government from suit for any damages resulting from negligence in flood-related activities.[170] The Supreme Court, however, narrowed the FCA immunity in *Central Green Co. v. United States*.[171] The Court articulated a new test requiring consideration of the "character of the waters that cause the relevant damage rather than the relation between that damage and a flood control project."[172] The Court required a more case-by-case inquiry into the "character of the waters," recognizing that some floodwaters are immune and others are not.[173] Thus, the Court opened the government up to liability for damages caused by certain floodwaters.[174]

Sovereign immunity exists at the state and local levels as well. The Eleventh Amendment of the U.S. Constitution bars actions against a state in federal court absent consent, waiver, or abrogation of the state's sovereign immunity.[175] The doctrine of sovereign immunity is statutorily based in most states,[176] and constitutionally based in others.[177] Like the federal government, state laws relating to disaster management, whether natural or manmade, also provide for governmental immunity.[178]

3. *In re Katrina Canal Breaches Litigation*: Governmental Immunity as a Bar to Recovery for Hurricane-Related Damage

In 1956, Congress authorized construction of the Mississippi River Gulf Outlet (MRGO), which was completed in 1968 and created a shorter

169. *See* Sarah Juvan, Note, *The Federal Flood Control Act: Congressional Development of a Modern-Day Ark*, 44 DRAKE L. REV. 303, 306 (1996). The Act "provided for a comprehensive program of flood control projects, including the building of dikes, dams, and levees." *Id.*

170. *See* United States v. James, 478 U.S. 597, 608, 612 (1986) (holding that the immunity provision provided absolute immunity to the federal government for any damage related to flood control activities); Nat'l Mfg. Co. v. United States, 210 F.2d 263, 270 (8th Cir. 1954) (holding that when Congress enacted the FCA, it "safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language").

171. 531 U.S. 425 (2001).

172. *See* Cent. Green Co. v. United States, 531 U.S. at 437.

173. *See id.* at 436, 437.

174. *See In re* Katrina Canal Breaches Consol. Litig., 471 F. Supp. 2d 684, 694 (E.D. La. 2007).

175. U.S. CONST. amend. XI.

176. *See, e.g.*, COLO. REV. STAT. § 24-10-106 (2006); KAN. STAT. ANN. § 75-6104 (2005); ME. REV. STAT. ANN. tit. 14, § 8103 (2006); MICH. COMP. LAWS § 691.1401 (2006); MO. REV. STAT. § 537.600 (2006); N.H. REV. STAT. ANN. § 29-A:1 (2006); N.J. STAT. ANN. § 59:1-2 (West 2006); N.M. STAT. ANN. § 41-4-4 (West 2006); 1 PA. CONS. STAT. ANN. § 2310 (West 2006); S.C. CODE ANN. § 15-78-60 (2005); TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2006); WYO. STAT. ANN. § 1-39-104 (2006).

177. *See, e.g.*, FLA. CONST. art. X, § 13; KY. CONST. § 231; MONT. CONST. art. II, § 18; W. VA. CONST. art. VI, § 35.

178. *See, e.g.*, ARIZ. REV. STAT. ANN. § 26-314 (2006); CAL. GOV'T CODE § 8655 (West 2006); 35 PA. CONS. STAT. ANN. § 7704 (West 2006).

shipping route between the Gulf of Mexico and New Orleans.[179] At the same time, the U.S. Army Corps of Engineers also implemented the Lake Pontchartrain and Vicinity Hurricane Protection Plan to protect areas of New Orleans from flooding.[180] The channel's original designers considered and rejected a plan to armor its banks with foreshore protection, leaving them vulnerable to erosion.[181]

The Corps's delay in armoring the MRGO allowed wave wash from large vessels to erode the channel considerably and added more fetch,[182] allowing for more forceful wave attack on the levees.[183] When Hurricane Katrina struck New Orleans in August 2005, the MRGO's expansion allowed Hurricane Katrina to generate a peak storm surge that breached the levee and flooded the city.[184] Many property owners sought recovery for their losses by filing lawsuits in federal court, naming the federal government as a defendant.[185] One group of seven plaintiffs, the Robinson plaintiffs, went to trial.[186] After nineteen days of trial, the district court found that neither the immunity provision of the FCA nor the discretionary-function exception to the FTCA protected the government from suit.[187] The court found three of the seven plaintiffs had successfully proven the government's liability.[188]

The government appealed the district court ruling to the Fifth Circuit.[189] In March 2012, the Fifth Circuit upheld the district court's ruling[190] because the MRGO was not a flood-control project.[191] The court noted that had the Corps installed foreshore protection on the MRGO, it would have given the canal the immune character of a flood-control activity.[192] The government failed to install flood-control protections, however, and therefore could not claim FCA immunity.[193] The Fifth Circuit next turned to the FTCA and the discretionary function exception, upholding the district court's ruling that the exception did not bar the suit.[194] After determining that the decision about whether to armor the MRGO's banks involved an element of judgment, thus satisfying the first prong of the *Berkovitz* test, the court considered whether the Corps's inaction met the second prong by involving

179. *See In re* Katrina Canal Breaches Litig., 696 F.3d 436, 441 (5th Cir. 2012) (en banc), *rev'g* 673 F.3d 381.
180. *Id.* at 442.
181. *Id.*
182. "Fetch is defined as the width of open water that wind can act upon. The height of waves . . . is a function of the depth of the water as well as the width of the expanse (i.e., the fetch) over which wind impacts the water." *Id.* at 443 n.2.
183. *Id.* at 443.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *See id.*
190. *See In re* Katrina Canal Breaches Litig., 673 F.3d 381 (5th Cir. 2012), *rev'd by* 696 F.3d 436.
191. *See id.* at 389.
192. *Id.* at 390.
193. *Id.*
194. *Id.* at 391.

policy considerations.[195] The court found that the discretionary function of the FTCA was inapplicable because the key judgment made by the Corps involved only the use of objective scientific principles and not any public-policy considerations.[196]

Following the adverse ruling, an en banc panel reversed the judgments for the plaintiffs and granted judgment for the government.[197] The Fifth Circuit left the holding on the FCA immunity undisturbed from the initial ruling.[198] The court, however, reassessed its application of the discretionary function exception, finding that there was "ample record evidence indicating the public-policy character of the Corps's various decisions."[199] The Fifth Circuit explored the availability of alternatives to armoring the banks and found that "[t]he Corps's actual reasons for the delay are varied and sometimes unknown, but there can be little dispute that the decisions here were susceptible to policy considerations."[200] Thus, finding that the discretionary function exception did in fact apply to the Corps's actions, the court held that the exception "completely insulates the government from liability."[201]

II. AN OVERVIEW OF INSURANCE

This part first defines insurance and property insurance coverage against natural forces. It next describes the insurance issues raised by Hurricane Katrina. Finally, it details government involvement in natural disaster insurance, specifically Florida's Hurricane Catastrophe Fund and the federal government's National Flood Insurance Program.

A. Insurance Basics

"[I]nsurance is a contract by which one party (the insurer), for a consideration that usually is paid in money . . . promises to make a certain payment, usually of money, upon the destruction or injury of 'something' in which the other party (the insured) has an interest."[202] The thing that must be destroyed or injured to trigger the insurer's obligation varies according to the nature of the contract.[203] For example, in the case of fire insurance or windstorm insurance, the thing insured is property.[204] Risk is the very nature of insurance, and individuals take an intellectual gamble when

195. *Id.* at 391–96.
196. *Id.* at 391. "The Corps misjudged the hydrological risk posed by the erosion of MRGO's banks." *Id.*
197. *See In re* Katrina Canal Breaches Litig., 696 F.3d 436, 441 (5th Cir. 2012) (en banc), *rev'g* 673 F.3d 381. Presented with a petition for rehearing en banc, the Fifth Circuit treated the petition as a petition for rehearing and withdrew its initial March 2012 ruling. *See id.*
198. *Id.* at 444–48.
199. *Id.* at 451.
200. *Id.*
201. *Id.* at 454.
202. *See* 1 COUCH ON INSURANCE § 1:6 (Lee R. Russ & Thomas F. Segalla eds., 3d rev. ed. 2011).
203. *Id.*
204. *Id.*

purchasing insurance as they weigh the expense of purchasing insurance against the amount of coverage they purchase.[205]

1. First-Party Insurance Versus Third-Party Insurance

Insurance policies can be classified in two ways, focusing on who bears the loss: first-party insurance and third-party insurance.[206] First-party insurance covers losses suffered by the policyholder herself.[207] Under a first-party insurance scheme, an insurance company "pays [the insured] as soon as the damage occurs, provided that it can be proven that the particular damage is an insured risk covered by the insurance policy," regardless of whether there is liability.[208] Accordingly, first-party insurance protection is removed from tort law and provides an insurance scheme whereby insureds ex ante seek coverage.[209] First-party insurance can be divided further into two groups: (1) personal injury insurance and (2) property insurance.[210]

In contrast, third-party insurance provides coverage for losses caused by the policyholder.[211] These losses are incurred by someone other than the policyholder and expose the policyholder to legal liability for causing the loss.[212] Thus, third-party insurance "treat[s] the loss being insured against as that of the outside party."[213] Malpractice liability insurance is a common example of third-party insurance.[214]

2. Property Insurance

One of the most common forms of insurance is property insurance, which "includes a broad spectrum of policies and coverages applicable to just about any type of property that exists."[215] For insurance purposes, property can generally be divided into many categories, including real property and personal property.[216] The type of property influences the coverage terms, such as specific inclusions and specific exclusions "because [the type] influence[s] the degree to which the property tends to be exposed to various categories of risk."[217] The major risk categories include: (1) deliberate theft; (2) misplacement, misdelivery, or unexplained loss;

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205. *See* 43 AM. JUR. 2D *Insurance* § 2 (2013). For additional detail about insurance and risk, see *infra* Part III.C–D.

206. *See* Ronen Avraham, *The Economics of Insurance Law—A Primer*, 19 CONN. INS. L.J. 29, 35–36 (2012). This Note will focus on first-party insurance, and property insurance in particular. In the hurricane-related context, victims will primarily turn to their property insurance policy, if available, for compensation. *See infra* Part II.B.

207. *See* Avraham, *supra* note 206, at 35.

208. *See* Michael Faure & Véronique Bruggeman, *Catastrophic Risks and First-Party Insurance*, 15 CONN. INS. L.J. 1, 11–12 (2008).

209. *Id.* at 12.

210. *Id.* at 13.

211. *See* Avraham, *supra* note 206, at 35–36.

212. *See id.*

213. *See id.* at 36 n.6.

214. *See id.* at 36.

215. *See* 10A COUCH ON INSURANCE, *supra* note 202, § 148:1.

216. *See id.* § 148:3.

217. *Id.*

(3) contamination, pollution, and the like; and (4) breakage/physical damage/destruction.[218] Breakage/physical damage/destruction is a broad risk category that includes several subcategories, including water and wind.[219]

The standard property policy specifies the perils and resulting losses it covers.[220] Most modern insurance policies, however, cover multiple perils or provide blanket coverage for "all perils."[221] Specifically, natural force perils may be explicitly included or excluded in a policy.[222] Insureds, for example, "may purchase insurance to cover loss resulting from violent storms or high winds [that] may be given any of several labels, including cyclone, hurricane, storm, tornado, and windstorm or weather insurance."[223]

In order to recover from the insurer, the windstorm must be the proximate cause of the damage the insured sustained.[224] Proximate cause in insurance law, however, is different from proximate cause in tort cases.[225] Some courts have defined proximate cause as the efficient cause or the cause that sets other causes in motion.[226] Under this definition, an insurer is liable for an insured's claim when the damages sustained were the result of a risk or peril covered in the insurance policy.[227] Courts have further expanded efficient proximate cause to permit recovery in circumstances in which two or more causes, one of which is a covered peril and one of which is an excluded peril, act concurrently to cause a single loss and the covered peril is determined to be the efficient proximate cause.[228] However, insurers generally contract out of the efficient proximate cause doctrine.[229]

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218. *Id.*

219. *Id.* The most relevant subcategories for this Note's consideration are water and wind. Other subcategories include (1) fire, explosion, or both, (2) freezing and overheating, (3) collision with other objects, (4) mishandling, (5) vandalism and other deliberate acts, and (6) misuse and overuse. *Id.*

220. *See id.* § 148:48. In a policy against:

> damage by tornado, hurricane, or windstorm, the words "tornado" and "hurricane" are synonymous. . . . The word "windstorm" partially takes its meaning from "tornado" and "hurricane" and indicates wind of unusual violence. A "windstorm" need not have either the cyclonic or the whirling features, which usually accompany tornadoes or cyclones, but it must assume the aspect of a storm—that is, an outburst of tumultuous force.

See 43 AM. JUR. 2D, *supra* note 205, § 472.

221. *See* 10A COUCH ON INSURANCE, *supra* note 202, § 148:50; 11 COUCH ON INSURANCE, *supra* note 202, § 153:2.

222. *See* 11 COUCH ON INSURANCE, *supra* note 202, § 153:2.

223. *Id.* § 153:4.

224. *Id.* § 153:12.

225. *See* 43 AM. JUR. 2D, *supra* note 205, § 470.

226. *See* 7 COUCH ON INSURANCE, *supra* note 202, § 101:45; *see, e.g.*, Kish v. Ins. Co. of N. Am., 883 P.2d 308, 311 (Wash. 1994) (holding that the efficient proximate cause rule operates to permit coverage when an insured peril sets other excluded perils in motion).

227. *See* 7 COUCH ON INSURANCE, *supra* note 202, § 101:45.

228. *Id.*

229. *Id.*; *see also* TNT Speed & Sport Ctr., Inc. v. Am. States Ins. Co., 114 F.3d 731, 733 (8th Cir. 1997) (holding that language in an insurance policy reflects the insurer's intent to contract out of application of the efficient proximate cause doctrine).

Thus, issues of recovery may arise when there is a question of whether the windstorm was in fact the proximate cause of the damage.[230] Specifically, issues of recovery arise when the property damage could have been caused by either windstorm or improper construction of the property.[231] Recovery is only possible "if the windstorm was the cause of the damage, and not the improper construction."[232]

Additionally, even if water is a contributing cause to property damage, an insured may only recover under a policy insuring against a windstorm if the wind is found to be the proximate cause of the damage.[233] Furthermore, recovery is only possible "if the policy does not contain an exclusion for water-related perils."[234] Typically, water is an excluded peril, preventing recovery, unless wind first damages the property, and water enters the property through openings made by the wind.[235]

To recover under a windstorm policy, the insured must show that the property damage falls within specified perils of the policy.[236] If the insured can show that damage is covered, then the burden shifts to the insurer to establish that the damage falls within a specified exclusion.[237]

B. Insurance Issues Raised by Hurricane Katrina

On August 31, 2005, two days after Hurricane Katrina made landfall in the Gulf States, at least 80 percent of New Orleans was under floodwater, largely as a result of levee failures.[238] The hurricane's strong forces led to breaks in the levee, flooding New Orleans with twenty feet of water.[239] In Mississippi, parts of Biloxi and Gulfport were also flooded as a result of the hurricane's storm surge.[240] Despite nearly half of the property damage being caused by waters rather than wind, only a few property owners had flood insurance coverage under the National Flood Insurance Program.[241] Instead, affected property owners had to turn to their private insurance for compensation.[242] It became clear, however, that many of the property losses resulting from Hurricane Katrina were not covered by insurance.[243]

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230. *See* 11 COUCH ON INSURANCE, *supra* note 202, §§ 153:17, :23.
231. *Id.* § 153:23.
232. *Id.*
233. *See id.* § 153:16.
234. *Id.*; *see also infra* Part II.B.
235. *See* 11 COUCH ON INSURANCE, *supra* note 202, § 153:17.
236. *Id.* § 153:25.
237. *Id.*
238. *See* NAT'L OCEANIC AND ATMOSPHERIC ADMIN., NAT'L CLIMATIC DATA CTR., HURRICANE KATRINA 5 (2005), *available at* http://www.ncdc.noaa.gov/extremeevents/specialreports/Hurricane-Katrina.pdf.
239. *See id.*
240. *Id.*
241. *See* Howard A. VanDine III & Erik T. Norton, *Anti-Concurrent Causation Clauses and Hurricane Relief: Was It Wind or Water?*, S.C. LAW., Jan. 2008, at 19. See *infra* Part II.C.2.a for a description of the National Flood Insurance Program.
242. VanDine III & Norton, *supra* note 242.
243. *See* Craig A. Cohen & Mark H. Rosenberg, *After the Storm: Courts Grapple with the Insurance Coverage Issues Resulting from Hurricane Katrina*, 43 TORT TRIAL & INS.

Consequently, many policyholders sued their insurance companies, "challeng[ing] insurer decisions limiting or denying coverage for hurricane-related claims."[244]

In *Leonard v. Nationwide Mutual Insurance Co.*,[245] plaintiffs sought coverage from their insurance company for damage caused by Hurricane Katrina.[246] The Leonards' home was twelve feet above sea level on the southernmost edge of Pascagoula, Mississippi, less than two hundred yards from the Mississippi Sound.[247] During Hurricane Katrina, a storm surge flooded the first level of the Leonards' two-story home.[248] The Leonards' homeowner's policy from Nationwide was an "all-risk" policy, which covered "all damage to dwellings and personal property not otherwise excluded."[249] Nationwide's policy, however, only covered damage caused by certain "perils" and excluded damages caused by others.[250] For example, the Leonards' policy insured against wind damage to a dwelling and to personal property but excluded damage caused by water.[251] The water-damages exclusion language of the Leonards' policy also addressed situations in which an excluded peril and a covered peril combine to damage a dwelling or personal property.[252] This language denied coverage whenever an excluded peril and a covered peril acted concurrently to combine damage.[253]

Following the storm, inspection of the Leonards' home revealed modest wind damage: the roof suffered broken shingles and loss of ceramic granules, doors in the house and garage had been blown open, and a "golf-ball sized" hole was found in a ground-floor window.[254] The water damage, however, was extensive.[255] While the second floor of the house remained untouched, a seventeen-foot storm surge flooded the first floor with five feet of water.[256] The waters severely damaged the walls, floors, fixtures, and personal property.[257] After the insurance adjuster evaluated the damage, the Leonards received a check for $1661.17—"the amount determined attributable solely to wind."[258] Nationwide denied coverage for

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PRAC. L.J. 139, 140 (2008) (providing a summary of hurricane-related insurance litigation); *see also supra* notes 232–34 and accompanying text.

244. *See* Cohen, *supra* note 243, at 140.

245. 499 F.3d 419 (5th Cir. 2007).

246. *See* Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 423 (5th Cir. 2007).

247. *Id.*

248. *Id.* at 424.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 425.

253. *Id.* This language is "commonly referred to as an 'anticoncurrent-causation clause,' or 'ACC clause.'" *Id.*

254. *Id.* at 426.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* "At trial, the Leonards offered expert testimony that the total damages actually exceeded $130,000, but this figure did not apportion damages caused by different perils.

most of the Leonards' claim because the damages caused by water and the storm surge's concurrent wind-water action were barred by the water damages exclusion and the anticoncurrent-causation clause (ACC) of the Leonards' policy, respectively.[259]

Following a bench trial, the Southern District of Mississippi held that the ACC clause was ambiguous, concluding: "Thus, [the ACC] language does not exclude coverage for different damage, the damage caused by wind, a covered peril, even if the wind damage occurred concurrently or in sequence with the excluded water damage. The wind damage is covered; the water damage is not."[260] The court applied Mississippi law and held that a Mississippi policyholder could recover for loss that is caused by wind, even if the damage was also caused concurrently by an excluded peril.[261] According to the district court, under Mississippi law, the ACC clause was invalid.[262] Despite invalidating the ACC clause, the district court ultimately concluded that only $1,228.16 in damages was caused by wind rather than storm surge, and therefore limited the Leonards' recovery to this amount.[263]

Nationwide appealed, however, because it was litigating the ACC clause issue in other cases in the trial courts, and this ruling could potentially lead to enormous liability to other policyholders.[264] On appeal, the Fifth Circuit analyzed the ACC clause and held that "[c]ontrary to the district court's ruling, Nationwide's ACC clause is not ambiguous, nor does Mississippi law preempt the causation regime the clause applies to hurricane claims."[265] The Fifth Circuit determined that insurance policies at issue in the Mississippi case law, on which the district court based its decision, did not contain ACC clauses similar to the one at issue; rather, the doctrine of efficient proximate cause controlled in those older cases.[266] Furthermore, since the Mississippi Supreme Court had not ruled on a claim involving an ACC clause, the Fifth Circuit made an "*Erie* guess"[267] on the issue and held that the "use of an ACC clause to supplant the default [efficient proximate cause] regime is not forbidden by Mississippi case law . . . [and] the ACC clause . . . must stand."[268]

The Leonards' wind-specific assessment claimed $47,365.41, including costs for roof replacement and structural repairs to the garage." *Id.*

259. *Id.*

260. *Id.* at 428 (quoting Leonard v. Nationwide Mut. Ins. Co., 438 F. Supp. 2d 684, 693 (S.D. Miss. 2006)).

261. *Id.*

262. *Id.*

263. *Id.* at 426.

264. *Id.* at 428.

265. *Id.* at 430.

266. *Id.* at 433–34.

267. *Id.* at 431.

268. *Id.* at 436.

C. Government Involvement in Natural Disaster Insurance

Although private insurers are generally the insurers of property from natural forces, the federal and state governments have shown some interest in entering the field of weather-related insurance.[269] This section examines government involvement in the insurance industry, including the Florida Hurricane Catastrophe Fund and Florida's Citizens Property Insurance Corporation, as well as the federal government's National Flood Insurance Program.

1. Florida's Response to Its Insurance Crisis

Florida is a uniquely risky insurance market because of its size and geographical position, with 1200 miles of coastline and most of its insured residential and commercial property lying in coastal areas vulnerable to both wind and flooding damage.[270] On August 24, 1992, Hurricane Andrew struck South Florida and ravaged Florida's private insurance industry.[271] When the Category 4 hurricane made landfall, the storm had sustained wind speeds of approximately 145 miles per hour, with gusts of at least 175 miles per hour and storm surges up to 16.9 feet.[272] The storm destroyed 28,066 homes and damaged another 107,380 homes, leaving 180,000 people homeless.[273] Andrew caused more than $15 billion[274] in insured damage.[275] The scope of Hurricane Andrew's destruction caught many insurance companies unprepared, affecting the efficiency of claims processing.[276] In 1992, property insurers in Florida collected only $1.5 billion in premiums and paid out about ten times that amount to victims of Hurricane Andrew.[277] As a result of the losses caused by Andrew, several insurance companies became insolvent and most others believed they were overexposed in Florida.[278]

In response to the state's insurance crisis, the Florida legislature created the Florida Hurricane Catastrophe Fund.[279] The creation of the fund was necessary because "insurers were unable or unwilling to maintain

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269. *See* 11 COUCH ON INSURANCE, *supra* note 202, § 153:2.

270. *See* David Adams, *Analysis: As Hurricanes Loom, Florida Insurance Lives on Borrowed Time*, REUTERS (June 1, 2013, 8:10 AM), http://www.reuters.com/article/2013/06/01/us-usa-weather-insurance-analysis-idUSBRE95007520130601. "Only New York has as much exposure." *Id.*

271. *See* Robert L. Rabin & Suzanne A. Bratis, *Financial Compensation for Catastrophic Loss in the United States*, *in* DISASTER LAW AND POLICY 292, 296 (Daniel A. Farber et al. eds., 2d ed. 2010).

272. *See id.*

273. *See id.*

274. Adjusted for inflation, the insured loss is more than $25 billion. *See supra* note 20 and accompanying text.

275. *See* 31 FLA. JUR. 2D *Insurance* § 2542 (2013).

276. *See* Rabin, *supra* note 271, at 296.

277. *See id.* at 297.

278. *See id.*

279. FLA. STAT. ANN. § 215.555(1)(a)–(f) (West 2006).

reserves,[280] surplus, and reinsurance[281] sufficient to enable [them] to pay all claims in full in the event" of catastrophic hurricanes.[282] Therefore, as a condition of doing business in the state, each insurer is required to enter into a reimbursement contract with the state, and in return, the contract contains a promise "to reimburse the insurer for 45 percent, 75 percent, or 90 percent of its losses from each covered event in excess of the insurer's retention, plus 5 percent of the reimbursed losses to cover loss adjustment expenses."[283]

The legislature also created the Florida Commission on Hurricane Loss Projection Methodology within the State Board of Administration.[284] The Commission consists of "a panel of experts to provide the most actuarially sophisticated guidelines and standards for projection of hurricane losses possible" to develop reimbursement premium rates for the Florida Hurricane Catastrophe Fund.[285]

a. Florida's Insurer of Last Resort: Citizens Property Insurance Corporation

Property insurance typically does not cover hurricane-related flood damage, which has to be insured separately.[286] Additionally, most homes in Florida are not covered by private insurance but by the federal insurance program.[287] In 2002, the Florida legislature created Citizens Property Insurance Corporation ("Citizens"), a not-for-profit government corporation, which sought to more efficiently and effectively provide insurance to homeowners in high-risk areas and others who could not find coverage in the open, private insurance market.[288] Citizens is currently Florida's largest property insurer with 21 percent of the entire residential market.[289]

Approximately 18 percent of every premium Citizens collected from policyholders is allocated to pay hurricane and other catastrophe claims.[290] However, if Citizens has to borrow money to pay its claims after a storm, Florida law requires Citizens to place an assessment on both Citizens

280. Reserves are estimates of amounts insurers will have to pay for losses that have been reported but not yet paid, for losses that have been incurred but not yet reported, and for administrative costs of resolving claims. *See* 17A COUCH ON INSURANCE, *supra* note 202, § 251:29.

281. Reinsurance is when an insurance company transfers its risk under a policy to another insurance company. *See* 1A COUCH ON INSURANCE, *supra* note 202, § 9:1. Essentially, "reinsurance is insurance for insurance companies." *Id.*

282. FLA. STAT. ANN. § 215.555(1)(d).

283. *Id.* § 215.555(4)(a)–(b).

284. *See id.* § 627.0628.

285. *Id.* § 627.0628(1)(c).

286. *See* 11 COUCH ON INSURANCE, *supra* note 202, § 153.16–.17.

287. *See* Adams, *supra* note 270.

288. FLA. STAT. ANN. § 627.351(6).

289. *See* Adams, *supra* note 270.

290. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-179, HOMEOWNERS INSURANCE: MULTIPLE CHALLENGES MAKE EXPANDING PRIVATE COVERAGE DIFFICULT 35 (2014).

policyholders and private insurance policyholders.[291] Citizens charges assessments in three tiers, beginning with the Citizens Policyholder Surcharge and each additional tier is charged only if the level before it is insufficient to eliminate Citizens' deficit.[292] Policyholders are still paying off an assessment from Florida's last storm, Hurricane Wilma in 2005.[293]

Citizens has tried to manage its exposure and reduce the potential for assessments by issuing catastrophe bonds, which allow the insurer to transfer risk to private investors.[294] After a successful purchase of $575 million in private reinsurance and $900 million in pre-event catastrophic bonds in 2011, Citizens set a goal of transferring at least $1 billion in exposure to private markets by the end of 2012.[295] In 2012, Citizens reduced its risk by 42 percent by issuing $750 million in catastrophe bonds, returning 277,000 policies to the private market, and reducing the property value covered in its coastal policies to less than $1 million.[296]

b. Returning Citizens to Its Original Goal

On May 29, 2013, Florida Governor Rick Scott signed into law a new property insurance law designed to further reduce the state's exposure to hurricane losses by reforming the state's largest insurance company, Citizens Property Insurance Corporation.[297] Significantly, the bill steers some of Citizens' current insurance policyholders to private insurance companies.[298] The law establishes a clearinghouse program to match Citizens policyholders and applicants with private insurers willing to offer coverage at comparable rates.[299] The new law also prevents "Citizens from insuring homes valued at more than $1 million—a cap that gets lowered gradually until it reache[s] $700,000 in 2017."[300] Additionally, any new homes built in Florida's high-risk coastal areas are no longer insured as of July 1, 2014.[301] The hope is that these changes will return Citizens to its original purpose as the insurer of last resort.[302]

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291. *Id.*; *see also* FLA. STAT. ANN. § 627.351(6)(b)(3)(a)–(j).

292. *See* CITIZENS PROP. INS. CORP., *supra* note 290.

293. *See* Adams, *supra* note 270.

294. *See* Michael Adams, *Florida's Citizens Issues Largest Catastrophe Reinsurance Bond on Record*, INS. J. (May 3, 2012), http://www.insurancejournal.com/news/southeast/2012/05/03/246145.htm.

295. *See* Michael Adams, *Florida's Citizens Eyes Risk Transfer While Lawmakers Plot Changes*, INS. J. (Jan. 18, 2012), http://www.insurancejournal.com/news/southeast/2012/01/18/231560.htm.

296. *See id.*

297. *See* Press Release, Fla. Governor Rick Scott, Governor Scott Signs Bill to Reform Citizens (May 29, 2013), *available at* http://www.flgov.com/2013/05/29/governor-scott-signs-bill-to-reform-citizens/.

298. *See* FLA. STAT. ANN. § 627.3518 (2013).

299. *Id.* § 627.3518(5).

300. Chad Hemenway, *Florida Gov. Scott Signs Bill to Reform Last-Resort Insurer*, PROPERTY CASUALTY 360° (May 30, 2013), http://www.propertycasualty360.com/2013/05/30/florida-gov-scott-signs-bill-to-reform-last-resort.

301. *Id.*

302. *See* Hemenway, *supra* note 300.

2. The Federal Response: National Flood Insurance

The federal government has often provided disaster relief after large-scale storms.[303] After Hurricane Betsy struck the Gulf Coast in 1965, private insurers began charging excessively high premiums for flood insurance, driving many flood victims to depend on "federal taxpayer-financed, *ad hoc* disaster programs."[304] The federal flood program was created to regularize this practice of providing disaster relief and "to provide incentives to municipalities and individuals to limit their risk exposure."[305]

a. The National Flood Insurance Program

In 1968, upon finding that many factors had made it uneconomical "for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions,"[306] Congress created the National Flood Insurance Program (NFIP) to provide flood insurance coverage.[307] The NFIP provides nationwide flood insurance through cooperative efforts of the federal government and the private insurance industry.[308] Additionally, Congress found that a federal program would create a uniform standard to regulate development inside flood plains and, ultimately, minimize the risk of loss by discouraging property development in flood prone areas.[309]

FEMA administers the NFIP, and participation in the program depends on an agreement between local communities[310] and the federal government.[311] Generally, the agreement states that if a community adopts and enforces a floodplain management ordinance to reduce future flood risks, the federal government will make flood insurance available within the community.[312]

Implementation of the NFIP occurs in three stages.[313] First, the community applies, identifies the flood prone area, prepares preliminary

303. *See* Daniel A. Farber, *Tort Law in the Era of Climate Change, Katrina, and 9/11: Exploring Liability for Extraordinary Risks*, 43 VAL. U. L. REV. 1075, 1119 (2009).

304. *See* Dominic Spinelli, Note, *Reform of the National Flood Insurance Program: Congress Must Act Before the Next Natural Disaster*, 39 REAL EST. L.J. 430, 435 (2011).

305. *See* Farber, *supra* note 303, at 1119.

306. 42 U.S.C. § 4001(b) (2012).

307. *See* Rachel Lisotta, Note, *In Over Our Heads: The Inefficiencies of the National Flood Insurance Program and the Institution of Federal Tax Incentives*, 10 LOY. MAR. L.J. 511, 514 (2012).

308. *See* 42 U.S.C. § 4001–4129.

309. *See id.* § 4001(c)(1)–(2).

310. Community is defined for NFIP purposes as state, area, or political subdivision. *See* FED. EMERGENCY MGMT. AGENCY, ANSWERS TO QUESTIONS ABOUT THE NFIP 3 (2011), *available at* http://www.fema.gov/media-library-data/20130726-1438-20490-1905/f084_atq_11aug11.pdf.

311. *Id.* at 1.

312. *See id.*

313. *See* Oliver A. Houck, *Rising Water: The National Flood Insurance Program*, 60 TUL. L. REV. 61, 73 (1985).

Flood Insurance Rate Maps,[314] and enacts a basic ordinance.[315] Second, the community enters the Emergency Program through which residents may obtain subsidized insurance.[316] Third, the community must adopt stricter ordinances to enter the Regular Program.[317]

Any owner of insurable property may purchase flood insurance coverage, provided that the community in which the property is located is a participant in the NFIP.[318] Although participation in the NFIP is voluntary, most mortgage lenders mandate flood insurance for property located in a participating community and in an area of high risk.[319] Property owners may purchase NFIP coverage through any licensed property insurance provider.[320] All flood coverage through the NFIP is identical from company to company and the rates are regulated by the NFIP.[321] The rates depend on many factors, which include the age, location, and design of the building, along with the flood zone.[322]

Areas that are at high risk for floods are called Special Flood Hazard Areas (SFHA).[323] High-risk areas have at least a 1 percent annual chance of flooding, or a one-in-four chance of flooding over the life of a thirty-year mortgage.[324] All homeowners in these areas with mortgages from federally regulated or insured lenders are required to purchase flood insurance.[325] Areas that are at low-to-moderate risk for flooding are called Non-Special Flood Hazard Areas (NSFHA).[326] In moderate-to-low risk areas, the risk of flooding is not immediate.[327] Flood insurance is not required, although it is recommended for all property owners and renters because historically one-in-four claims come from these moderate-to-low risk areas.[328]

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314. Flood Insurance Rate Map is the official map of a community "on which FEMA has delineated both the special hazard areas and the risk premium zones applicable to community." *See Flood Insurance Rate Map*, FED. EMERGENCY MGMT. AGENCY, http://www.fema.gov/floodplain-management/flood-insurance-rate-map-firm (last visited Nov. 26, 2014).

315. *See* Houck, *supra* note 313, at 73.

316. *See id.*

317. *See id.* at 73–74.

318. *See* FED. EMERGENCY MGMT. AGENCY, *supra* note 310, at 9.

319. *See id.* at 11.

320. *See id.* at 10.

321. *Id.* at 3.

322. *Id.* at 11. Each flood zone describes the area's risk of flooding: low, moderate, or high. *See What Are Flood Zones?*, NAT'L FLOOD INS. PROGRAM, http://www.floodsmart.gov/floodsmart/pages/faqs/what-are-flood-zones.jsp (last visited Nov. 26, 2014).

323. *See What is a Special Hazard Flood Area (SHFA)?*, NAT'L FLOOD INS. PROGRAM, http://www.floodsmart.gov/floodsmart/pages/faqs/what-is-a-special-flood-hazard-area.jsp (last visited Nov. 26, 2014).

324. *See id.*

325. *See supra* note 319 and accompanying text.

326. *See What is a Non-Special Flood Hazard Area (NSFHA)?*, NAT'L FLOOD INS. PROGRAM, http://www.floodsmart.gov/floodsmart/pages/faqs/what-is-a-non-special-flood-hazard-area.jsp (last visited Nov. 26, 2014).

327. *See id.*

328. *Id.*

The federal legislation establishing the NFIP also provides the types of flood insurance.[329] The federal flood insurance covers direct physical loss caused by "flood" and categorizes covered losses primarily by the source of the damaging water: "an overflow of inland or tidal waters; unusual and rapid accumulation or runoff of surface waters from any source; mudflow; or collapse or subsidence of land . . . as a result of erosion or undermining . . . that result in a flood."[330] Other limitations on covered losses include a requirement that the floodwater affect two or more properties, or more than two acres of property for the damage to be eligible under the NFIP.[331] Furthermore, the NFIP limits specific coverage to $250,000 in damages for residential buildings and to $100,000 in damages for personal property .[332] Currently, more than 5.5 million people hold flood insurance policies in communities throughout the United States with an insured value of $1.3 trillion.[333]

b. Problems Faced by the National Flood Insurance Program

The NFIP was intended to reduce the government's escalating costs for repairing flood damage.[334] Until 2004, the NFIP was able to pay most of its claims with premiums or occasional loans from the Department of the Treasury.[335] However, after the 2005 hurricane season, the program faced an unprecedented amount of claims and had to borrow $16.8 billion from the Treasury.[336] In 2006, the Government Accountability Office (GAO) added the NFIP to its High-Risk List "due to losses from the 2005 hurricanes and the financial exposure the program created for the federal government."[337]

GAO reported that the NFIP's financial condition revealed the program funding's structural weaknesses.[338] The NFIP is a not-for-profit institution.[339] The program fulfills a public policy goal: "provide flood insurance in flood-prone areas to property owners who otherwise would not be able to obtain it."[340] Congress expected the NFIP to use the premiums it collects from insureds to cover claims and its operating expenses.[341] However, the program has been left financially vulnerable because of

329. *See* Lisotta, *supra* note 307, at 514; *see also* FED. EMERGENCY MGMT. AGENCY, NATIONAL FLOOD INSURANCE PROGRAM SUMMARY OF COVERAGE, *available at* http://www.floodsmart.gov/toolkits/flood/downloads/NFIP-SummaryCoverage.pdf (last visited Nov. 26, 2014).

330. *See* FED. EMERGENCY MGMT. AGENCY, *supra* note 329, at 1.

331. *See id.*

332. *See id.*

333. *See* U.S GOV'T ACCOUNTABILITY OFFICE, GAO-13-858T, NATIONAL FLOOD INSURANCE PROGRAM: CONTINUED ATTENTION NEEDED TO ADDRESS CHALLENGES 1 (2013).

334. *See id.* at 2.

335. *Id.* at 4.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

subsidized policies.[342] The NFIP sustains losses from these policies because it is unable to collect sufficient premiums to cover losses, operating costs, and loan payments to the Treasury. Additionally, most policies "are associated with structures more prone to flood damage . . . because of the way they were built or their location."[343] Losses to the NFIP are especially great in years of catastrophic flooding.[344] Furthermore, this "results in much of the financial risk of flooding being transferred to the federal government and ultimately the taxpayer."[345] As of July 31, 2013, the NFIP owed approximately $24 billion to the Treasury.[346]

c. Insurance Reform: The Biggert-Waters Act

Recently, Congress passed the Biggert-Waters Flood Insurance Reform Act of 2012, extending the National Flood Insurance Program until September 30, 2017.[347] Not only does the law extend the NFIP, but it also requires significant reform of the insurance program. The law requires the NFIP to raise rates to reflect true flood risk, make the program more financially stable, and change how Flood Insurance Rate Map updates impact policyholders.[348] There are four major changes: First, the law removes subsidized rate premiums for properties that have been provided flood insurance at below-market rates since their communities first joined the program, generally in the 1970s.[349] Second, it establishes a Technical Mapping Advisory Council intended to advise FEMA on improving the accuracy of flood maps and on standards that should be adopted for flood maps.[350] Third, it allows premiums to rise at a significant rate on the basis of the new maps.[351] Finally, it clarifies FEMA's authority to transfer a portion of the nation's flood risk to the private sector through the purchase of reinsurance.[352] Together, these efforts help increase the NFIP's long-term financial stability.[353]

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342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *See* Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. No. 112-141, 126 Stat. 916.
348. *See Flood Insurance Reform Act of 2012*, FED. EMERGENCY MGMT. AGENCY, http://www.fema.gov/flood-insurance-reform-act-2012 (last updated July 24, 2014).
349. *See Questions about the Biggert-Waters Flood Insurance Reform Act of 2012*, FED. EMERGENCY MGMT. AGENCY, http://www.fema.gov/media-library-data/20130726-1912-25045-9380/bw12_qa_04_2013.pdf (last visited Nov. 26, 2014).
350. *See* Press Release, Ass'n of State Floodplain Managers, Biggert-Waters Flood Insurance Act of 2012 Summary of Contents 5 (Aug. 2012), *available at* http://www.floods.org/ace-files/documentlibrary/News_Views/August_2012_News_Views.pdf.
351. *Id.* at 15.
352. *See* NAT'L ASS'N OF INS. COMM'RS, BIGGERT-WATERS FLOOD INSURANCE REFORM AND MODERNIZATION ACT OF 2012 5 (2012), *available at* http://www.naic.org/documents/cipr_events_2012_cipr_summit_overview.pdf.
353. *See* U.S GOV'T ACCOUNTABILITY OFFICE, *supra* note 333, at 5.

The changes were phased in starting in 2012.[354] However, on October 28, 2013, the Senate reached a deal delaying the changes to the federal flood insurance program that raise premiums for many homeowners, requiring FEMA to address the affordability of coverage before implementing the rate increases.[355]

III. TORT OR INSURANCE: WHICH SYSTEM IS BEST?

Courts are presented with two alternatives for compensating hurricane victims. Courts may allow victims to litigate their losses through the tort system, recognizing new causes of action, where none had been recognized before.[356] Alternatively, courts can leave compensation to the insurance industry. This part examines the goals and criticisms of tort and insurance. The discussion begins by examining the justifications advanced in support of the tort system, and then proceeds to discuss the criticisms of these goals. Next, this part turns to the goals and criticisms of insurance. With these goals and criticisms in mind, Part IV then examines which system is best for compensating victims of hurricanes.

A. Justifications in Support of the Tort System

In the case of hurricanes, questions may arise as to whether tort law even applies, and if it does, whether the plaintiff can prove the tortfeasor's negligence.[357] Because courts often define hurricanes as acts of God, the only viable theory for recovery is usually the failure to take adequate preventive measures.[358] Thus, the scope of liability is very limited.

However, a number of different justifications have been advanced in support of the tort system.[359] As tort law has developed, two leading justifications have emerged: tort law as a means of providing compensation to the injured and tort law as a means of deterring future accidents.[360]

1. Making Victims Whole: Tort's Goal of Compensation

The "cardinal principle" of damages in tort cases is that of compensation.[361] Tort liability is predicated on some form of fault on the part of the defendant.[362] Consequently, the defendant becomes the source

354. *See* FED. EMERGENCY MGMT. AGENCY, *supra* note 349.

355. *See Bipartisan Deal Reached to Delay Flood Insurance Premium Hikes: Waters*, INS. J. (Oct. 28, 2013), http://www.insurancejournal.com/news/national/2013/10/28/309383.htm.

356. *See supra* note 26 and accompanying text.

357. *See* Michael G. Faure, *Financial Compensation for Victims of Catastrophes: A Law and Economics Perspective*, 29 L. & POL'Y 339, 342 (2007).

358. *See supra* Part I.C; *supra* notes 3–13 and accompanying text.

359. *See* Beltran, *supra* note 18, at 154.

360. *See id.*

361. *See* Fleming James, Jr., *Damages in Accident Cases*, 41 CORNELL L.Q. 582, 583 (1956).

362. *See supra* note 37–50 and accompanying text.

of compensation.[363] Furthermore, compensation is seen as "repairing plaintiff's injury or of making him whole as nearly [as possible] by an award of money."[364]

As early as the mid-nineteenth century, "scholars and courts began to focus on more general principles for awarding damages," looking to the purpose of damages as compensation.[365] Courts also started referring to the idea of "mak[ing] the plaintiff whole" no matter what the cause of action.[366] Some courts simply refer to making the victim whole,[367] "while others write in terms of returning the victim to the position she was in prior to the accident[368] . . . or putting the victim in the position she would have been in 'had there been no injury.'"[369] Even jury instructions follow this theory of compensation, "directing the jury to award damages that will make the victim whole or return her to the position in which she would have been had the accident not occurred."[370]

Over the past few decades, modern courts have embraced the principle of compensation as the primary goal of tort law.[371] This idea has led courts to expand liability in certain areas, such as landowner liability.[372] For example, in *Sprecher v. Adamson Co.*,[373] the court held that a possessor of land is no longer immunized from liability for harm caused by the natural condition of his land to persons outside his premises.[374] In rejecting the distinction between artificial and natural conditions in favor of ordinary principles of negligence to determine exposure to liability, the court held: "'A [person's] life or limb [or property] does not become less worthy of protection by the law nor a loss less worthy of compensation under the law'

363. *See* Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 86 (1993).

364. *See* James, Jr., *supra* note 361, at 583.

365. *See* Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1578 (1997); *see also* McInroy v. Dyer, 47 Pa. 118, 121 (1864) ("What the law seeks to secure in an assessment of damages to an injured party is compensation.").

366. *See McInroy*, 47 Pa. at 121 ("What will make the plaintiff whole is the same in one form of action as in the other. No distinction is recognized by the courts.").

367. *See, e.g.*, Varlack v. SWC Caribbean Inc., 550 F.2d 171, 178 (3d Cir. 1977) (stating that "the goal in assessing compensatory tort damages is to make the plaintiff whole for losses he has actually suffered").

368. *See, e.g.*, Big Rock Mountain Corp. v. Stearns-Roger Corp., 388 F.2d 165, 169 (8th Cir. 1968) (noting that the philosophy of law is "to allow as compensation an amount which would place him in the same position he occupied immediately prior to the injury").

369. *See* Feldman, *supra* note 365, at 1578-79; Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1249 (3d Cir. 1971) (stating that compensation is for losses the victim would not have suffered "had he not been injured").

370. *See* Feldman, *supra* note 365, at 1579.

371. *See id.* at 1578; Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 591 (1985).

372. *See* Sugarman, *supra* note 371, at 591 n.159.

373. 636 P.2d 1121 (Cal. 1981).

374. *See id.* at 1128.

because that person has been injured by a natural, as opposed to an artificial, condition."[375]

Compensation or "making a victim whole" receives judicial expression as a normative ideal in that courts see compensation as "a means of achieving fairness."[376] This notion of fairness can be seen as an outgrowth of the fault principle of tort: "If the defendant is the wrongdoer . . . it seems eminently fair that these damages should (at least) put the plaintiff, as nearly as may be, in the same position he would have been if defendant's wrong had not injured him."[377] Although notions of fairness are particularly applicable to cases of personal injury, notions of fairness also apply to cases of harm to property.[378]

In negligence suits, judges and juries are typically faced with choosing between "a single plaintiff who may have suffered greatly and a defendant who is a giant enterprise or is backed" by third-party liability insurance.[379] On the one hand, judges and juries see defendants that "can readily absorb and widely distribute this loss" through the mechanism of the price system or through third-party liability insurance.[380] On the other hand, an individual victim may not be able to bear the financial burden of the loss very well.[381]

2. The Deterrence Function of Tort Law: Reduction of Accidents and the Optimization of Risk

Another primary goal of tort law is deterrence or the reduction of accidents.[382] Simply stated, tort liability deters dangerous conduct.[383] Otherwise, without the threat of liability, people act without regard to the safety of others, and "[a]s a result, people (and property) would be unreasonably damaged."[384] However, tort law forces people to take the interests of others into account by instituting liability for negligent conduct, which threatens the possibility of litigation costs and hefty compensatory damages.[385] Thus, tort law causes people to alter their behavior in a "socially desirable, less injury-reducing way," to avoid liability.[386]

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375. *See id.* (quoting Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968)).

376. *See* SPECIAL COMM. ON TORT LIAB. SYST., TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4–29 (1984).

377. *See* James, Jr., *supra* note 361, at 583.

378. SPECIAL COMM. ON TORT LIAB. SYST., *supra* note 376, at 4–49; *see, e.g.*, Barker v. S.A. Lewis Storage & Transfer Co., 61 A. 363, 363 (Conn. 1905) (holding, in a conversion case, that "[t]he cardinal rule is that a person injured should receive *fair* compensation for his loss or injury" (emphasis added)).

379. *See* Sugarman, *supra* note 371, at 591.

380. *See id.*

381. *See id.*

382. *See* SPECIAL COMM. ON TORT LIAB. SYST., *supra* note 376, at 4–3.

383. *See* Sugarman, *supra* note 371, at 559.

384. *See id.* at 560.

385. *See id.*

386. *See id.*

Tort law as a deterrence mechanism can also be examined using an economic efficiency analysis.[387] Under this analysis, tort law ought to encourage people to act efficiently and optimize accident costs.[388] Proponents of this goal, like Judge Richard A. Posner, interpret Judge Hand's famous formula[389] as giving an "economic meaning to negligence."[390] Consequently, Judge Posner sees the negligence standard as a weighing of costs and benefits, "promoting the most efficient allocation of resources because its economic calculus encourages only cost-justified precautions."[391]

As discussed in Part I.B, under the Hand formula, liability depends on whether the burden of taking a precaution is less than the loss or injury multiplied by the probability that the loss will occur.[392] Judge Posner explains that by "the burden of taking precautions against the accident," Hand was referring to the cost of prevention.[393] The cost of prevention, he further explains, "may be the cost of installing safety equipment or otherwise making an activity safer."[394] The cost could also be seen as the loss of a benefit caused by curtailing or eliminating an activity.[395] Thus, if the costs of prevention are less than the potential injury, "society is better off if those costs are incurred and the accident averted."[396] Thus, tort liability is imposed leading the tortfeasor to adopt "precautions in order to avoid a greater cost in tort judgments."[397] If, on the other hand, the cost of precautions exceeds the potential loss by injury (B > PL), "society would be better off, in economic terms, to forgo accident prevention."[398] Here, the threat of liability cannot "induce the [injurer] to increase the safety of [his conduct]" because a "rational profit-maximizing [person] will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability."[399] Furthermore, Judge Posner explains, in such instances it is more efficient for society to allow the defendant to avoid the excessive costs of accident prevention.[400]

Judge Posner applies the same economic analysis to accident avoidance by the victim.[401] If the victim could have avoided the accident by taking precautions "at lower cost than any measure taken by the injurer would

387. *See* SPECIAL COMM. ON TORT LIAB. SYST., *supra* note 376, at 4–13.
388. *See id.*
389. *See supra* notes 86–92 and accompanying text.
390. *See* Posner, *supra* note 83, at 32.
391. *See* John G. Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193, 1200 (1984); *see also* Posner, *supra* note 83, at 32–33.
392. *See supra* note 90 and accompanying text.
393. *See* Posner, *supra* note 83, at 32.
394. *See id.*
395. *See id.*
396. *See id.* at 33.
397. *See id.*
398. *See id.* at 32.
399. *See id.* at 32–33.
400. *Id.* at 33.
401. *See id.*

involve, it [is] uneconomical to adopt a rule of liability that placed the burden of accident prevention on the injurer."[402]

Thus, according to Judge Posner, the "dominant function" of tort law is to encourage people to act efficiently or optimize accident costs.[403] Under this view, "a judgment of negligence implies that there was a cheaper alternative to the accident."[404] Conversely, where the alternatives to the accident are burdensome, it is less efficient to attach liability to a defendant's actions.[405]

Optimizing accident costs is also the basis for Judge Guido Calabresi's analysis of the tort system.[406] Using an economic analysis of tort law, Judge Calabresi views the primary goal of tort law as a means to minimize the cost of accidents.[407] Judge Calabresi further divided this goal down into three subgoals: (1) primary cost avoidance (the reduction in the number and severity of accidents resulting in injuries); (2) secondary cost avoidance (the reduction of societal costs resulting from accidents); and (3) tertiary cost avoidance (the reduction in the costs of administering a regulatory system for achieving primary and secondary cost avoidance).[408] In order to reduce the cost of accidents, Judge Calabresi argues that the tort system should focus on primary accident cost avoidance or the deterrence of accidents, rather than secondary cost avoidance.[409] Additionally, according to Judge Calabresi, tort law ought to work by means of general deterrence.[410]

Judge Calabresi, as an economist, assumes that individuals will respond to price changes.[411] General deterrence (or market deterrence) encourages individuals through pricing to avoid a given course of conduct or to go about it in a way that promises to make it less expensive.[412] Specifically, the general deterrence approach operates in two ways to reduce accident costs.[413] First, it creates incentives to engage in safer activities—some people who would engage in a relatively dangerous activity at prices that did not reflect its accident costs will shift to a safer activity if the accident costs are reflected in prices.[414] Thus, the shift from a dangerous activity to

402. *See id.*
403. *Id.*
404. *Id.*
405. *See id.*
406. Timothy C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019, 1032 (2001).
407. *See* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26–27 (1970).
408. *See id.* at 26–29.
409. *See id.* at 43–44.
410. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 375 (2005).
411. *See* CALABRESI, *supra* note 407, at 70.
412. *See id.* at 103–04.
413. *See id.* at 73.
414. *See id.*

a safer activity will reduce accident costs.[415] Second, general deterrence reduces accident costs by encouraging persons to make activities safer.[416]

A general deterrence approach presents a follow-up question: Who ought the law incentivize to change his conduct to promote primary accident cost avoidance most effectively?[417] Calabresi's answer is that the law ought to search for the cheapest cost avoider and place the losses associated with certain accidents on that actor.[418] If the goal of general deterrence is primary accident cost avoidance, then the tort system should allocate the costs of accidents to those who could avoid the accident costs most cheaply.[419] Cost avoidance should be the responsibility of the actor who is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to take preventive measures when they are cheaper than the avoided accident costs.[420]

B. Criticisms of the Tort System

Professor Sugarman argues that there is widespread social consensus in favor of deterring socially undesirable behavior and compensating victims.[421] However, the tort system has many critics.[422] These critics argue that the justifications advanced in support of the tort system are unattainable or inefficiently pursued.[423] This part explores these criticisms by first examining the criticisms of tort's goal of compensation and then turning to the criticisms of the goal of deterrence.

1. Failure to Compensate

The first serious criticism of tort law is that its goal of compensation fails. The deficiencies of tort as a compensation system can generally be seen as undercompensation and overcompensation, arbitrary compensation, and high administrative costs that undercut compensation.[424]

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415. *See id.*

416. *See id.* Calabresi offers an example to illustrate how general deterrence operates to cause an activity to become safer:

> Taney drives a car. His car causes, on the average, $200 per year in accident costs. If a different kind of brake were used in the car, this would be reduced to $100. The new kind of brake costs the equivalent of $50 per year. If the accident costs Taney causes are paid either by the state out of general taxes or by those who are injured, he has no financial incentive to put in the new brake. But if Taney has to pay, he will certainly put the new brake in. He will thus bear a new cost of $50 per year, but it will be less than the $100 per year in accident costs he will avoid. As a result, the cost of accidents to society will have been reduced by $50.

Id. at 73–74.

417. *See id.* at 135–36.

418. *See id.* at 135–40.

419. *See id.* at 135.

420. *See id.* at 135–40.

421. *See* Sugarman, *supra* note 371, at 616.

422. *See, e.g.*, Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 765 (1987); Sugarman, *supra* note 371.

423. *See* Sugarman, *supra* note 371, at 558–59.

424. *Id.* at 592.

"Tort law cannot provide compensation to enormous numbers of accident victims."[425] There are many accidents where the plaintiff cannot identify a plausible defendant with superior loss-spreading ability.[426] Many tort defendants are judgment-proof or have no funds to satisfy tort judgments.[427] Plaintiffs will also "settle cases for less than full loss because of delay, lack of proof, urgent financial need, contributory negligence, and limited insurance."[428] Furthermore, despite the liberalization of certain tort claims, courts have generally narrowed liability.[429] Absent fault, there is no liability.[430]

Thus, "both reality and current doctrine create a substantial *liability gap*."[431] Furthermore, "tort law bars compensation to victims who, from the perspective of their need, are as deserving as those who succeed through the system."[432] Thus, the tort system leaves a large proportion of seriously injured victims uncompensated or substantially undercompensated.[433]

However, on the other hand, compared with other systems of compensation, tort law may be overcompensating victims.[434] Although many tort cases result in no claims at all, plaintiffs in other cases may receive more compensation than they deserve because defendants find buying off claims cheaper than litigation.[435] Tort law also refuses to consider the victim's other sources of compensation, like insurance.[436]

Compensation through tort can also seem arbitrary.[437] "Geographical bias also pervades the system."[438] For example, states have adopted considerably different positions toward the problem of asbestos injuries, even though the problem is national.[439]

Finally, the tort system is administratively expensive in comparison to other compensation systems.[440] First, liability insurance policies lead to large insurance commissions and other marketing costs.[441] And, the "highly individualized and unpredictable rules [of tort law] promote exorbitant claims administration, including investigation costs and lawyer

425. *Id.*
426. *Id.*
427. *Id.* at 593; *see also* Stephen G. Gilles, *The Judgment-Proof Society: "As the System Currently Operates, Liability Is, for Wrongdoers . . . Voluntary,"* 63 WASH. & LEE L. REV. 603, 606 (2006).
428. *See* Sugarman, *supra* note 371, at 593–94.
429. *Id.* at 593.
430. *Id.*; *see also supra* notes 39–50 and accompanying text.
431. Sugarman, *supra* note 371, at 593.
432. *Id.*; *see also* Smith, *supra* note 422, at 768–69.
433. *See* Sugarman, *supra* note 371, at 594; *see also* Beltran, *supra* note 18, at 180.
434. *See* Sugarman, *supra* note 371, at 595.
435. *Id.*
436. *Id.*
437. *Id.* at 594.
438. *Id.*
439. *Id.*
440. *Id.* at 596.
441. *Id.*

fees."[442] As a result, probably only half of any insurance money goes to the plaintiff.[443]

2. General Deterrence Fails

The major criticism of tort as a deterrence mechanism is that this function "overemphasizes both the amount of overly dangerous activity that would occur without tort liability, and the amount of injury-reduction achieved."[444] More specifically, the tort model of general deterrence fails for five reasons.[445]

First, people are usually ignorant of the law.[446] Deterrence requires knowledge.[447] Yet, Sugarman argues that many people seem to be ignorant of the threat of tort liability.[448] He attributes this "in part to individual inattentiveness and in part to our society's failure to instruct people effectively in their civil obligations."[449] Furthermore, even a sophisticated potential tort defendant has many reasons to see the system as highly unpredictable.[450] "These reasons include doctrinal complexity, rapid legal change, state-to-state variance, the perceived lottery-like nature of secret jury decision-making, the [inconsistencies] of trials, and [quick settlement] practices."[451]

People may also fail to appreciate that they are engaging in injury-producing conduct.[452] This can occur because people are not aware of the consequences of their behavior. On the other hand people might not take the time to "analyze all the information necessary to make the 'right' decision" because such decisions often take "too much time, money, or attentiveness."[453] Thus, people may "rely on shortcuts such as rules of thumb or advice and customs of others."[454] Unavailability of information can also undermine deterrence.[455] For example, "people don't become aware that their conduct or product is harmful until long after the harm has occurred."[456]

Second, people are generally incompetent.[457] The "reasonable person" standard is difficult for ordinary people to meet.[458] "Ordinary people occasionally act clumsily, rashly, or absent-mindedly."[459]

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442. *Id.*
443. *Id.*
444. *Id.* at 561.
445. *Id.* at 565–70.
446. *See* Smith, *supra* note 422, at 772–73.
447. *See* Sugarman, *supra* note 371, at 565–70.
448. *Id.*; *see also* Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 340 (2012).
449. *See* Sugarman, *supra* note 371, at 565.
450. *Id.* at 566.
451. *Id.*
452. *Id.*
453. *Id.* at 567.
454. *Id.*
455. *Id.*
456. *Id.*
457. *Id.* at 568; *see also* Beltran, *supra* note 18, at 185.

Third, people generally discount the threat of tort liability.[460] Sometimes this discounting can be quite rational because some victims with bona fide claims will not sue or the judicial system will fail to impose liability.[461] Additionally, a defendant "is aware that many cases can be settled for far less than the . . . damages incurred."[462] Or the risk is discounted because it is so small.[463] Still further, larger risks are ignored because potential tortfeasors "hop[e] that miraculously no one will be hurt or that they [will not] be caught."[464]

Fourth, people put their personal needs before those of others, even when their conduct is dangerous.[465] Yet the conduct remains socially unacceptable.[466] Still, the tort law system, through settlements, leads "people to conclude that paying monetary damages is an acceptable tradeoff for the ability to engage in objectionable high-stakes conduct."[467]

Fifth, people generally conclude that they face little penalty because the tortfeasor can almost always avoid an official slap on the wrist by settlement.[468] Related to this is the idea, Sugarman argues, that people will not change their behavior in response to the threat of having to pay for the harm they cause if, in practice, that threat is sharply reduced or eliminated.[469] The threat to pay damages is reduced or eliminated due to a few factors. For example, many individuals do not have the resources with which to pay damages.[470] Thus, "the threat of a judgment is not meaningful."[471] Additionally, tort damages are inadequate.[472] The deterrence function of tort law "requires the correct threat in order to produce the appropriate safety-minded response."[473] But tort damages are meant to compensate those who are injured and not to deter the injurer.[474] Finally, market imperfections also weaken the penalty of tort damages.[475] A defendant can always shift the cost of tort damages to its consumers and avoid any meaningful loss.[476]

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458. *See* Sugarman, *supra* note 371, at 568.
459. *Id.*
460. *See id.* at 569.
461. *Id.*
462. *Id.*
463. *Id.*
464. *Id.*
465. *Id.* at 570.
466. *Id.*
467. *Id.*
468. *Id.* at 570–71; *see also* Steven D. Smith, *Rhetoric and Rationality in the Law of Negligence*, 69 MINN. L. REV. 277, 308–14 (1984) (noting that the judicial system encourages private resolution through settlement).
469. *See* Sugarman, *supra* note 371, at 571.
470. *Id.* at 571–72.
471. *Id.* at 572.
472. *Id.*
473. *Id.*
474. *Id.* at 572–73.
475. *Id.* at 573.
476. *Id.*

C. The Role of First-Party Insurance in the Compensatory System

Another significant part of the compensatory system for hurricane victims is first-party insurance.[477] First-party insurance protection trends away from tort law as victims seek protection before the loss occurs.[478] Under such a scheme, in the event of significant loss the burden of compensating the victim falls on the victim's own insurer, rather than a third-party tortfeasor.[479] The role of first-party insurance is "to protect communal welfare by protecting against catastrophic losses" such that first-party insurance "can fill in where the tort system cannot provide remedies."[480] For example, first-party insurance may protect against events that are arguably not caused through the fault of any actor, such as fire or flood damage.[481] Insurance protects the communal welfare by performing three related but distinct functions in the compensatory system: risk-bearing, risk-distribution, and loss prevention.

1. A Risk-Bearing Role

First, insurance transfers risk from the insured to the insurer.[482] This transfer of risk "enhances economic stability and personal security by making the future more predictable."[483] It is assumed that a vast majority of individuals are risk averse when faced with the possibility of large future losses.[484] Risk aversion is the preference for certainty over uncertainty with regard to future losses.[485] Thus, "a risk averse individual will pay a small premium now to protect against potentially large, but uncertain losses in the future . . . ."[486] Furthermore, risk aversion also affects what type of insurance and how much coverage an individual purchases.[487]

2. A Risk-Spreading Role

Next, insurance is a mechanism by which risk is spread among many individuals.[488] Insurance spreads the risk of loss among all participants by pooling insureds.[489] Pooling insureds is a successful method of spreading risk because not all insureds will suffer losses at the same time and the pool is large enough to sustain some loss.[490] Thus, "insurance is a risk-sharing

477. *See* Rick Swedloff, *Uncompensated Torts*, 28 GA. ST. U. L. REV. 721, 744 (2012).
478. *See* Faure, *supra* note 208, at 12.
479. *See id.* at 11–12.
480. *See* Swedloff, *supra* note 477, at 744.
481. *See id.*
482. *See* Kenneth S. Abraham, *The Role of Insurance*, *in* COMPENSATION AND LIABILITY FOR PRODUCT AND PROCESS INJURIES 1, 2 (1987).
483. *Id.*
484. *See* Avraham, *supra* note 206, at 37.
485. *Id.*
486. *Id.*
487. *See* Abraham, *supra* note 482, at 2.
488. *Id.*
489. *Id.*
490. *Id.*

arrangement."[491] It spreads the loss among a larger group of people.[492] The risk-sharing function of insurance largely erodes the "individualistic rationale of traditional tort law."[493]

3. Loss Prevention

Finally, insurance may also prevent or minimize loss.[494] Insurance companies have the institutional knowledge and expertise to suggest and implement cost-effective preventative measures.[495] Through reduced premiums insurers may incentivize insureds to prevent or minimize loss.[496] For example, the installation of a sprinkler system may reduce the risk of a fire destroying a commercial property by half.[497] Not only is the risk of the property being destroyed reduced by installing the sprinkler system, the insurance "premium to be paid is also likely reduced to [a little more than] $5,000."[498] The property owner will have an incentive to upgrade its sprinkler system and thus reduce the risk of his future loss "if installing and maintaining the sprinkler system will cost less than $5,000 per year, and its installation can be easily verified by the insurer."[499]

D. Problems with First-Party Insurance

For insurance to effectively perform its three functions, it must overcome four problems: (1) accurate prediction of risk, (2) moral hazard, (3) cross-subsidization, and (4) adverse selection. The following four sections discuss these problems in detail.

For the insurance system to be successful, insurance companies must be able to accurately predict risk.[500] This predictability is fundamental to setting a price for coverage and pooling its insureds.[501] Without reliable information "about the probability and magnitude of losses . . . insurance cannot function effectively."[502]

When insurance premiums do not adequately reflect the risk being insured against, "insureds will not fully internalize expected accident costs and, consequently, will not invest efficiently in prevention."[503] This is

491. *Id.*
492. *See* Fleming, *supra* note 391, at 1209.
493. *Id.*
494. *See* Avraham, *supra* note 206, at 40.
495. *Id.*
496. *Id.*
497. *Id.* In this example, fire insurance on a property is "worth one million dollars [and] the chance of a fire destroying the property in a given year is 1%, which means the expected loss for that year is $10,000 and the insurance premium must be at least slightly more than that amount." *Id.*
498. *Id.*
499. *Id.*
500. *See* Abraham, *supra* note 482, at 3.
501. *See id.*
502. *See id.*
503. *See* Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 138 (1990).

called "moral hazard."[504] Despite the risk being reflected in higher premiums, the insured only considers her individual cost because the true cost of the risk is spread among policyholders.[505] Therefore, insurance is not effective in preventing accidents because insureds are not "required to weigh the full costs to themselves of an accident-prone activity against the benefits . . . ."[506]

Related to the problem of accurately predicting risk is cross-subsidization. Policyholders are not charged premiums based on their individual risk.[507] For example, policyholders "who present different levels of risk . . . are charged the same premium and lumped into the same insurance pool [as] low-damage insureds [and end up] cross-subsidiz[ing] high-damage insureds."[508] Accordingly, the low-risk policyholders pay more than the amount necessary to incentivize them to avoid dangerous conduct.[509]

Another problem with insurance occurs "when potential insureds who know that they pose above average risk 'self-select' into insurance pools."[510] Known as "adverse selection," this problem is a caused by "(1) the insurer's inability to classify insureds perfectly according to each insured's [risk], and (2) the insureds knowing how their own [risks] compare to the average expected damages of the insurance pool."[511] Adverse selection poses a problem because it "rais[es] the pool's average risk and thereby forces low-risk individuals to choose between paying disproportionately high premiums or foregoing insurance."[512]

IV. NO CLEAR WINNER: EXAMINING HURRICANE VICTIM COMPENSATION IN LIGHT OF THE GOALS AND CRITICISMS OF THE TORT AND INSURANCE SYSTEMS

The legal system provides a mix of public and private methods for compensating victims of natural disasters.[513] Part IV attempts to determine which system, tort or insurance, is best for compensating hurricane victims by examining hurricane compensation in light of the goals and criticisms of the two systems. First, Part IV.A considers hurricane compensation in light of the goals and criticisms of the tort system. Next, Part IV.B considers the compensation of hurricane victims in light of the goals and criticisms of the insurance system. Finally, this Note concludes that neither system adequately compensates all hurricane victims, although tort law may achieve its goal of deterrence in a natural disaster context.

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504. *See id.* at 139.
505. *Id.* at 138–39.
506. *Id.* at 139.
507. *Id.*
508. *Id.*
509. *See id.*
510. *Id.* at 140.
511. *Id.*
512. *Id.*
513. *See supra* Parts II–III.

A. Examining Tort Law

First, before the success of tort's goals can be evaluated, the issue of whether there is even a role for tort in a hurricane-related context must be addressed. Specifically, in the context of hurricane-related damage, tort litigation against responsible private parties has significant limitations.[514] First, a plaintiff must prove the tortfeasor's fault to recover.[515] Second, overcoming certain defenses, such as the act of God defense, is also essential to recovery.[516] Additionally, responsible governmental actors are almost always immune from suit.[517] Thus, tort litigation is limited to actions against private actors who negligently fail to take reasonable measures to prevent hurricane-related damage, such as the 2 Gold defendants.[518]

The tort law system's goals of compensating victims for their injuries and deterring future accidents are commendable, but, as the discussion above has shown, there is great debate regarding whether tort can effectively achieve either of these goals.[519] First, there has been tremendous discussion over whether tort damages actually compensate an injured victim.[520]

Tort's goal of making a victim whole simply means placing the victim in a position he would have been in had the damage not occurred.[521] In the circumstances of hurricane victims, such as the residents of 2 Gold, this would mean replacing items that were stolen or damaged due to the defendants' negligence.[522] In situations involving serious real and personal property damage after a hurricane, tort damages can be insufficient. First, there may be no plausible defendant because of certain immunities and defenses, so there may be no recovery at all.[523] Second, the substantive law may bar the suit altogether.[524] Thus, although the assertions that tort law overcompensates seem unfounded in this context, the argument by tort critics that tort undercompensates seems to ring true.[525]

Next, if a potential plaintiff is successful in litigating a claim, the tort system can take a substantial portion of the damages for administrative costs and attorney's fees, leaving the victim with even less compensation.[526] Finally, the ability of individuals to purchase insurance

514. *See supra* Part I.C.3.
515. *See supra* notes 56–82 and accompanying text.
516. *See supra* notes 114–41 and accompanying text.
517. *See supra* Part I.D.
518. *See supra* notes 9–13 and accompanying text.
519. *See supra* Part III.B.
520. *See supra* Part III.B.1.
521. *See supra* notes 365–67 and accompanying text.
522. *See supra* notes 3–13 and accompanying text.
523. *See supra* Part I.D; *supra* notes 114–41, 425 and accompanying text.
524. *See supra* Part I.C–D.
525. *See supra* notes 424–31 and accompanying text.
526. *See supra* notes 440–41 and accompanying text.

that will provide them with protection should hurricane damage occur reveals that the law's compensation function is less essential.[527]

Despite these factors, the tort system continues to play a role, though in somewhat limited circumstances, as a deterrent.[528] In the context of a tort action for the negligent failure to take reasonable measures to prevent hurricane-related damage, the threat of tort liability may successfully lead individuals to take more care.[529] Many sophisticated hurricane-related defendants, like TF Cornerstone, were in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to take the preventative measures, if cheaper than the accident costs.[530] A judgment of liability implies there was a cheaper alternative to the damage.[531] Some defendants may shift these costs to consumers, but the threat of tort liability will cause other potential tortfeasors to take necessary precautions in the future, avoiding serious damage.[532] Thus, in the hurricane-related context tort law may serve more as a deterrence mechanism than as compensation.

B. Examining Insurance

Catastrophic losses are precisely the kinds of risk for which loss-spreading, through some sort of insurance scheme, seems most appropriate.[533] The advance purchase of private insurance that covers a particular peril in question may ameliorate the financial consequences of many of the losses that result from catastrophic events like hurricanes.[534]

However, the insurance method of compensation also has limitations when it comes to compensating hurricane victims.[535] Specifically, hurricanes adversely affect and will continue to affect insurers' ability to adequately perform its goals.[536] For example, insurers will feel the impact of hurricanes on property, where the insurer bears the risk of the loss suffered directly by the policyholder.[537] Large-scale natural disasters, such as hurricanes, are a significant threat to insurer solvency.[538]

Additionally, the unavailability of insurance due to the exclusion of certain catastrophic risks creates significant hurdles to recovery.[539] Furthermore, potential victims may not purchase insurance even if it is available.[540] Some people may feel they simply cannot afford to buy the

527. *See supra* Part II.
528. *See supra* Part III.A.2.
529. *See supra* notes 384–86 and accompanying text.
530. *See supra* note 420 and accompanying text.
531. *See supra* note 403 and accompanying text.
532. *See supra* notes 391–404 and accompanying text.
533. *See supra* Part III.C.
534. *See supra* Part II.A.2.
535. *See supra* Part II.B.
536. *See supra* Part II.C.
537. *See supra* notes 206–07 and accompanying text.
538. *See supra* Part II.C.1.
539. *See supra* notes 233–35, 246–56 and accompanying text.
540. *See supra* note 241 and accompanying text.

insurance, while others, who could afford to buy private insurance coverage do not because they might fail to appreciate their own risk.[541] This could happen if coverage is sold separately for a specific risk, such as flood insurance, because potential victims may discount that particular threat to them, thereby concluding that insurance is unnecessary and too expensive.[542]

The insurance industry seems reluctant to provide coverage for large-scale natural disasters.[543] This reluctance may be in part because of the difficulty of assessing risk levels, as well as the costs associated with maintaining large levels of reserve or reinsurance.[544] Flood damage insurance provides a good example.[545] The federal flood insurance program is based in part on the reluctance of the private market to provide such insurance on a broad scale.[546] However, the federally subsidized flood insurance is not an entirely satisfactory solution. Private losses from catastrophes in the United States have been rising faster than premiums, causing the government's liabilities to exceed its assets, leading to extreme debt.[547] The government has tried to counteract this problem by raising premiums to reflect properties' true risk, but such changes have been halted.[548] Both private and public insurance systems leave gaps in compensation because they can only compensate those who have insurance. Thus, neither private nor public insurance successfully compensates all hurricane victims.

CONCLUSION

Hurricanes are unpredictable, unavoidable, and most often devastating. There is some consensus that hurricanes may increase in the future, and if they do, there is no doubt that significant damage will occur.[549] When such damage occurs, those who have suffered loss will seek compensation either from their insurance provider or the tort system.[550]

This Note provides a hard look at which system, tort or insurance, would best compensate hurricane victims.[551] However, when the next large-scale natural disaster strikes the United States, it is difficult to imagine which mechanism will best compensate victims because each system is plagued with limitations and neither system satisfactorily makes victims whole.[552] There is one significant role tort could play in hurricane-related damage—

541. *See supra* Part III.D.
542. *See supra* Part III.D.
543. *See supra* Part II.C.
544. *See supra* Parts II.C, III.D.
545. *See supra* Part II.C.2.
546. *See supra* Part II.C.2.
547. *See supra* Part II.C.2.b.
548. *See supra* Part II.C.2.c.
549. *See supra* notes 21–23 and accompanying text.
550. *See supra* Parts I–II.
551. *See supra* Part IV.
552. *See supra* Part IV.

the role of deterrence.[553] Tort could effectively deter negligent behavior by imposing liability on those who negligently fail to prepare and prevent hurricane-related damage.[554]

553. *See supra* notes 528–30 and accompanying text.
554. *See supra* notes 528–30 and accompanying text.